TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1929

No. 303

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

MABEL G. TOOPS, ADMINISTRATRIX OF THE ESTATE OF M. G. TOOPS, DECEASED

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS

PETITION FOR CERTIORARI FILED AUGUST 6, 1929

CERTIORARI GRANTED OCTOBER 21, 1929

(34,434)

(34,434)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 6, 1929

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[fol. 1] [Caption omitted]

[fol. 2]

IN DISTRICT COURT OF RENO COUNTY

No. 17687

MRS. MABEL G. TOOPS et al., Plaintiffs,

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, Defendant

NOTICE OF APPEAL—Filed May 31, 1928; in Supreme Court June 1, 1928

To Mabel G. Toops and her attorneys of record, Carr W. Taylor and James N. Farley:

You will take notice that the defendant herein appeals to the Supreme Court of the State of Kansas, from the judgment rendered in this case on the 26th day of May, 1928, and from each and every part thereof.

Wm. R. Smith, Wm. Osmond & J. S. Simmons, Attorneys for Defendant.

Service of the above notice of appeal is hereby acknowledged this 31st day of May, 1928.

Carr W. Taylor, James N. Farley, Attorneys for Plaintiff.

File endorsement omitted.

[fol. 3] IN DISTRICT COURT OF RENO COUNTY

No. 17687

MRS. MABEL G. TOOPS et al., Plaintiffs,

—

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, a Corporation, Defendant

JUDGMENT—Filed May 31, 1928; in Supreme Court June 1, 1928

Now on this 23rd day of April, 1928, this caouse came regularly on for trial, the plaintiff being present in person

and by her attorneys, Carr W. Taylor, and James N. Farley, and the defendant, The Atchison Topeka & Santa Fe Railway Company, being present by its attorneys John S. Simmons, and William Osmond. Thereupon both parties announced themselves ready for trial, and a jury of twelve good and lawful men was duly empaneled and sworn to well and truly try said cause and a true verdict render upon the evidence and the instructions of the court.

Thereupon said plaintiff introduced her evidence and rested, and thereupon the said defendant interposed a demurrer to plaintiff's evidence, which demurrer was by the court overruled and exceptions allowed. Thereupon said defendant introduced its evidence in rebuttal and rested, and thereupon the defendant moved the court to instruct the jury to return a verdict for the defendant for the reason that under the evidence in the case the defendant was entitled to a verdict, which motion was by the court overruled.

The court then instructed the jury as to the law of the case and said cause was argued by both counsel for plaintiff and defendant, and said cause was submitted to said jury for their determination. Thereupon the jury was [fol. 4] placed in charge of a sworn officer and taken to the jury room, and thereafter on the 25th day of April 1928, said jury returned into court the following verdict which is in the words and figures as follows to-wit:

"We, the jury empanelled and sworn in the above entitled case, do upon our oaths find for the plaintiff and assess the amount of her recovery at the sum of Twenty Two Thousand Seven Hundred Fifty and no/100 Dollars.

(Signed) C. C. Alexander, Foreman."

Said jury also returned into court the following special interrogatories with the answers thereto submitted by the court, to-wit:

"Q. No. 1. Was M. G. Toops, the deceased, in charge of the train and switching operations at and before the time he was killed?

"A. No. 1. Yes.

"Q. No. 2. a. Was M. G. Toops killed by coming into contact with the 15 grain cars that were being placed on the elevator track?

"b. If you answer the preceding question, 'Yes,' state which car, if any, struck Toops.

"A. No. 2. The 1st car on west end of the 15 grain cars.

"Q. No. 3. Were there any marks of blood on the rear car of the 15 grain cars?

"A. No. 3. There was no direct evidence to show there was or was not.

"Q. No. 4. Were there marks of blood on the south wheels of all the other grain cars except the rear car?

"A. No. 4. Yes.

[fol. 5] "Q. No. 5. Did Toops know of the coming on the elevator tract of the 15 grain cars?

"A. No. 5. He knew they were to come.

"Q. No. 6. Was conductor Toops supplied with a good lantern?

"A. No. 6. He had a good lantern.

"Q. No. 7. If you answer Q. No. 6 in the affirmative then state if he could have by the aid of said lantern seen the approaching cars.

"A. No. 7. No.

"Q. No. 8. Had not Toops frequently worked on the Elkhart Branch from Dodge City to Elkhart?

"A. No. 8. Yes.

"Q. No. 9. Had the yards at Rola, Kansas, been materially changed since he worked on said line?

"A. No. 9. We don't know.

"Q. No. 10. State fully in what the negligence of the defendant consisted, if any?

"A. No. 10. First, in not protecting rear end of 15 grain cars, second, in engineer not sounding signal when starting to back cars around curve, and through cut; third, poor condition of tract at derail switch.

(Signed) C. C. Alexander, Foreman.

Thereupon said defendant on the 27th day of April, 1928, files its Motion to set aside findings and for judgment, and also filed its Motion for a New Trial. And thereafter on the 26th day of May, 1928, said cause came on to be heard [fol. 6] before the court upon said Motion to set aside findings and for judgment, and Motion for New Trial, and the court after hearing the arguements of counsel and being fully advised in the premises does hereby overrule each of said Motions as to each and every ground thereof.

It is therefore considered, ordered and adjudged by the court that the plaintiff do have and recover of and from the said defendant the amount of said verdict, to-wit $22,750.00, together with 6 per cent interest thereon from this date, together with the costs of this suit taxed at $326.55 for which let execution issue.

All of which is ordered and adjudged.

W. G. Fairchild, Judge.

O. K. Carr W. Taylor, James N. Farley, Attorneys for Plaintiff.

O. K. Wm. R. Smith, Wm. Osmond, J. S. Simmons, Attorneys for Defendant.

Clerk's certificate to foregoing papers omitted in printing.

[fols. 7 & 8] [File endorsement omitted.]

[fol. 9] [File endorsement omitted.]

[fol. 10] IN SUPREME COURT OF KANSAS

No. 28499

MABEL G. TOOPS, Administratrix of the Estate of M. G. Toops, Deceased, Appellee,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant

Appeal from Reno County District Court, Hon. W. G. Fairchild, Judge

Abstract of the Record on Behalf of Appellant—Filed July 9, 1928

On February 26, 1927, the above-named appellee filed her petition in the above-entitled cause, which, omitting caption, reads as follows:

PETITION

I

Comes now Mrs. Mabel G. Toops, Administratrix of the Estate of M. G. Toops, deceased, and states that she was

on the 24th day of February, 1927, appointed administratrix of the estate of said M. G. Toops, deceased, by the Honor-
[fol. 11] able Probate Court of Douglas County, Kansas, and that she is now the duly appointed, qualified and acting administratrix of said estate, and that this action is brought under the Federal Liability Act by said administratrix on behalf and for the benefit of herself as widow of M. G. Toops, deceased, and on behalf and for the benefit of Marthelle G. Toops, minor daughter of M. G. Toops, deceased.

II

The plaintiff further states that the defendant, The Atchison, Topeka & Santa Fe Railway Company, is a corporation, organized under the laws of the State of Kansas, with its principal office at Topeka, Kansas; that it conducts and operates a railway line from the city of Chicago, Illinois, through the states of Illinois, Iowa, Missouri, Kansas, Colorado and other points westward to Los Angeles and San Francisco, California, and also from Chicago, Illinois, via Newton, Kansas, to Galveston, Texas; that it also operates an interstate line extending from Elkhart, Morton County, Kansas, via Dodge City, Kansas, to interstate points upon defendants line of railway; that said defendant was at all times hereinafter mentioned, engaged in interstate commerce, in the transportation of freight and goods and passengers from the state of Kansas to other states of the United States and foreign countries.

III

Plaintiff further states that the said M. G. Toops, employed as a conductor by said Atchison, Topeka & Santa Fe Railway Company, was killed at Rolla, Kansas, on the 13th day of August, 1926, at about 1:00 o'clock a. m. of said day, by reason of the negligence of the above-named defendant, The Atchison, Topeka & Santa Fe Railway Company, its officers, agents, servants and employes as hereinafter specifically alleged.
[fol. 12]

IV

Plaintiff further alleges that for approximately eleven (11) years prior to the said 13th day of August, 1926, the

said M. G. Toops, deceased, was in the service of the defendant, first as a brakeman and afterwards as a conductor; that the said M. G. Toops as such conductor on the evening of August 12, 1926, was in charge of a freight train made up of and containing many cars of freight for transportation from Elkhart, Kansas, and other stations on said line to Dodge City, Kansas, and to points outside of the state of Kansas; that the said freight train arrived at Rolla, a station on defendant's line situated in Morton County, Kansas, northeast of Elkhart, Kansas, at about 12:15 a. m. on the morning of August 13, 1926; that said Conductor M. G. Toops was in full charge of said train and had received orders to take up five (5) cars of grain, four (4) of which were billed to Kansas City in the state of Missouri and were therefore interstate shipments; that these cars were standing on what is known as the elevator track in the yards at Rolla, Kansas; that the said Conductor Toops and the train crew switched said five (5) loaded grain cars from said elevator track to the main line of said railroad and placed same into said interstate train for transportation to points in other states; that the said M. G. Toops had further orders to set in on said elevator track for loading with grain for interstate shipment fifteen (15) grain cars which were standing upon what was known as the passing track, the northernmost track in said yards at Rolla, Kansas, and just west of approximately fifteen (15) stock cars also standing upon said passing track; that they caused the engine on said train to back up on said passing track and couple with said stock cars, back said cars to a coupling with said grain cars, then pulled said stock and grain cars, out onto the main line track, and lined the switches up to divert the cars to the elevator track. That while the engine and the [fol. 13] 12 stock cars and the 15 grain cars were on the main line track and the switches were thus lined to lead on to the elevator track, the rear brakeman Hemphill being at that time on the south side of the main line track and east of the cross-over switch, gave to the engineer a kick-in signal; that said kick-in signal was negligently, carelessly and recklessly given in that at the time it was given, Hemphill did not know the whereabouts of Conductor

Toops, did not look to see where he was, and that if he had looked he would have seen Conductor Toops and could have given him a signal or warning that the kick-in was about to be made; that without ascertaining the whereabouts of Toops, Hemphill gave to the engineer the kick-in signal and the engineer in obedience thereto started to propel his engine backwards with the intention of shoving the 15 grain cars on down the main line track and on to the elevator track; that Hemphill remained on the ground at the cross-over switch when the cot or kick-in should have been made and thereby divert the 12 stock cars back over on to the passing track; that the head brakeman Nolan during this time was on the south side of the track and 4 or 5 car lengths east of the cross-over switch at the passing track, and his duties, after the kick-in signal was given, were to make the cut between the 12 stock cars and the 15 grain cars and allow the grain cars to be kicked in on to the elevator track as aforesaid. That the track at this point and throughout the entire length of all of the tracks in Rolla, Kansas, is very dangerous in construction; that the same was negligently and carelessly constructed by the defendant company, its officers, servants, agents and employes in that it is skeletonized, that the surface of the ground next to the tracks is full of holes and pitfalls and had been allowed to grow up with weeds, and that the same were extremely dangerous and insecure to the workmen trying to operate trains of the defendant. That because of this dangerous condition of the track and [fol. 14] its environs, the head brakeman Nolan was unable to get on the train being backed as aforesaid in time to make the cut before the slack had run out; that he was therefore unable to make the cut, and separate the fifteen box cars from the twelve stock cars. It therefore became necessary for Hemphill to give the second kick signal, which he did, and the engineer in response thereto gave the cars a second kick. That at this time the entire train was moving at a speed of about 10 miles per our. In response to the second kick signal, Brakeman Nolan was able to make the cut and the 15 grain cars were separated from the engine and the 12 stock cars, and were kicked down the main line and in on to the elevator track.

Plaintiff alleges that the operation of said train as above described was a reckless, careless and negligent manner of operating said train on the part of the defendant, its officers, servants, agents and employes, in this, to-wit:

That at no time from the time the first kick-in signal was given by Brakeman Hemphill, was anyone on these 15 grain cars, until such time as shall be hereinafter set forth. That at no time during the operation of the train just described was Brakeman Hemphill or Brakeman Nolan in possession of knowledge of the whereabouts of Conductor Toops, although in the exercise of ordinary care they could have known his whereabouts; that at no time was any signal given by the engine or engine crew to Conductor Toops of their intention to kick in said 15 grain cars; that no whistle was blown; that no bell was rung; that there was no light on the west end of said 15 grain cars; that no brakeman or flagman was on the west end of said moving cars to give warning of the approach of the same onto and westward down said elevator tracks; that the tracks at Rolla, Kansas, at the point where the elevator track connects onto the main line track, made a very decided curve to the south; that there is a high bank at this point on the [fol. 15] south side of the track and that the view from the derail on the elevator track to the cross-over switch to the passing track is cut off; that the hill on the south side is 8 or 10 feet high; that the track at this point was skeletonized and was in a very dangerous condition as has been heretofore described; that the published rules of the defendant company provide that when cars are being rushed by an engine as hereinbefore described, a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need except when shifting or making up trains in yards. And the plaintiff alleges that there are no yards at Rolla, Kansas; that there are no yard limit boards in or near Rolla, Kansas; that there was no switch lights and no one on duty at night to assist in making switches or handling trains through said station; that all of these facts were well known to the members of the crew operating the train at the time of the death of Conductor Toops.

Plaintiff alleges that Conductor Toops after having coupled the air upon the 5 grain cars which had been put into the interstate train on the main track, walked over

to the east end of the depot and to a truck which was standing there, where he remained for a few minutes going through his order sheet; that as soon as he had completed that work, he proceeded east approximately 325 feet along the main line track and to a point north of the derail on the elevator track; that he was the conductor and in charge of said train; that as such conductor it was his duty to assist in spotting cars and switching the train; that this proper position was on the right hand side or the engineer's side of said train, which in this case was the south side; that in order to reach the south side of the train it was necessary for him to go south and cross the elevator track; that Conductor Toops, carefully, cautiously and [fol. 16] while in the line of his duty, proceeded to cross said elevator track at a point 3 or 4 feet east of the derail on said track with the intention of placing himself in position to assist at setting the cars to the elevators thereon; and that he was in the exercise of his duty in proceeding as above described; that the elevator track at this point, as has been heretofore described, was skeletonized and negligently constructed and in a dangerous condition; that the only light Conductor Toops had was the electric lantern which he carried in his hand; that it was necessary for him to carefully watch his footsteps; that just as he stepped on said elevator track, he was without warning struck by the west end of the 15 moving grain cars which had been negligently, carelessly and recklessly kicked in on to the elevator track by the engine crew in the manner hereinbefore described.

V

Plaintiff furthers alleges that said elevator track was negligently constructed and maintained by said defendant, its officers, agents, servants and employes in this, to-wit:

That at the place where Conductor Toops was killed on said elevator track, it was what is known as a skeleton track; that is, the railroad ties of the approximate dimensions of 6 inches thick, 8 inches wide and 8 feet long were laid on top of the ground, and the rails being approximately 4¾ to 5¼ inches high, were placed on top of the ties, the distance between the rails being 56 inches. That the ties were placed on the ground 8 to 10 inches apart. That no earth or ballast of any kind was placed between

or over the ties, and that this construction made said tracks unsafe for trainmen, especially at night in said unlighted yards; and that because of the space between the rails and the ties being vacant and unballasted, they were a trap and a snare for trainmen passing from one side of the track to the other; all of which was unknown to the said M. G. Toops, deceased.

[fol. 17] And plaintiff alleges that said negligent and dangerous construction of said track as above described was one of the contributing causes of the death of the said Conductor Toops, and that it was well known to the defendant, its officers, agents, servants and employes that said track was of the said skeleton construction, and was dangerous and insecure and was a snare and a trap to those crossing said track and more especially to those crossing said track in the night time.

VI

Plaintiff further alleges that at all the times hereinbefore mentioned, the said Conductor Toops at said Rolla, Kansas, was carrying an electric lantern which gave forth a bright light, and that said lantern was plainly visible to his fellow servants except when said Conductor Toops passed behind the west end of said string of box cars, at which time his lantern was burning brightly; and that it was the duty of the trainmen operating said train to observe the whereabouts of their fellow workmen, which at night are indicated only by their lanterns; and that it was the duty of the fellow servants to give signals to move said train only when the whereabouts of their fellow workmen were indicated by their lanterns; that the defendant, its officers, agents, servants and employes were guilty of negligence in this, to-wit:

That when the engine crew received the signal from the head brakeman who had given it without knowledge of the whereabouts of Conductor Toops, to kick in said string of grain cars for spotting at the elevators on the elevator track, the crew failed to ring the engine bell and failed to give the usual back-up or kick-in signal by whistle, and kicked said cars in on to the elevator track without giving any warning whatever to Conductor Toops that said train [fol. 18] was about to be kicked westward; and that not-

withstanding the fact that the night was very dark and that there were no lights in or near the tracks at Rolla, Kansas, to light up said elevator track, they kicked the cars as aforesaid and left them to roll in on to the elevator track of their own momentum with nobody on said cars or in charge thereof to give warning, and no lights of any kind or nature on or near them, and no warning of any kid or nature whatever of their approach.

Plaintiff alleges that as Conductor Toops in the line of his duty started to cross the elevator track as hereinbefore described, he was struck by the kicked-in cars as aforesaid, kicked in and operated by the defendant, its agents, officers, servants and employes, in the negligent manner hereinbefore described, and was knocked to the ground between the rails in the manner hereinbefore described at a point about 3 or 4 feet east of the derail on said elevator track; that his body was dragged along the ground between the tracks until his shoulders came to rest against the derail; that his head and right arm had fallen in such manner that they lay across the south rail of the elevator track and were severed from his body by the wheels of the rear car of said kicked-in cars; that when struck he threw his lantern to the south side of the track as a signal to the engine crew and brakeman to stop said cars; that there was no brakeman on said cars and the engine was not attached thereto and his signal was unobserved and met with no response; that his lantern lodged in the weeds and grass 2 or 3 feet from the rail; that he thereby met his death, and the sole and only causes therefor were the negligent, careless and reckless acts of the defendant, its officers, agents, servants and employes as hereinbefore set forth, in the operation of said train, and in the further negligence, carelessness and recklessness of the defendant, its officers, agents, servants and employes [fol. 19] in constructing the track at Dolla, Kansas, and allowing it to be and remain in the condition it was in at the time and place herinbefore mentioned and described.

Plaintiff alleges that at the time Conductor Toops was struck by the kicked in cars, they were proceeding quietly and not at a high rate of speed but at a rate of speed sufficient to carry them 2 or 3 car lengths beyond the place where Conductor Toops was struck and killed; that the enginemen after having kicked in the cars as hereinbefore

described threw the cross-over switch leading from the main line to the passing track and set the 12 stock cars back on the passing track, then took the engine back on to the main line track and proceeded to back into the 15 grain cars on the elevator track for the purpose of setting them to the elevators; that Rear Brakeman Hemphill rode the said 12 stock cars over to the passing track and set the brakes on them; that he then walked from the passing track over to the elevator and climbed upon the 15 grain cars at a point 4 or 5 car lengths from the place where Conductor Toops was lying dead; that he climbed up on top of said cars and gave the back-up signal to Head Brakeman Nolan, and Nolan in turn repeated it to the engineer, and the train was pushed backwards; that after giving the back-up signal Hemphill proceeded to walk in a westerly direction on top of the cars and towards the rear end of them; that Nolan walked to the second car from the engine and to the south side thereof in order to be in a position to see around the curve on the elevator track and better observe Hemphill and his signals; that just as the car upon which Nolan was standing was passing the derail, Brakeman Nolan saw the lighted lantern of Conductor Toops lying in the weeds, gave a violent stop signal, and the engineer stopped the train as soon as he could, but not until after the train had [fol. 20] proceeded westwards until the tender of the engine was over the body of Conductor Toops.

Plaintiff further alleges that by reason of the negligence of said defendant, its officers, agents, servants and employes as hereinbefore alleged, said Conductor Toops met his death in the manner and form set forth and to the plaintiff's damage as hereinafter stated.

VII

Plaintiff alleges that the said Conductor Toops was 37 years of age at the time of his death; that he was a healthy, cheerful, active, able-bodied man, and as a conductor was earning approximately the sum of Two Hundred Dollars ($200.00) per month; that his expectancy of life was approximately 30.35 years, according to the American Experience Table of Mortality; that at the time of his death, his widow, Mabel G. Toops, was of the tage of 36 years and had an expectancy of life of approximately 31 years; that

the said Marthelle G. Toops, his minor daughter, is of the age of 16 years; and that said widow and daughter were his sole and only heirs; that he died intestate; that said widow and daughter were dependent upon him for their support and maintenance; that they have no income, or property of their own from which they could derive support or income; that by the untimely death of said M. G. Toops, occasioned by the negligence of said defendant, its officers, agents, servants and employes, in the manner and form hereinbefore alleged, plaintiff's beneficiaries were and are damaged in the sum of Thirty-six Thousand Dollars ($36,000.00).

Wherefore plaintiff prays for judgment against the said defendant in the sum of $36,000.00 together with the costs of this action, and for such other and further relief as may to the court seem equitable and just.

[fol. 21] ANSWER

Comes now the defendant and for its answer to the petition of plaintiff says: That it denies each and every material allegation made by plaintiff; but admits that it is a corporation engaged in interstate commerce and that M. G. Toops, deceased, was a conductor in the employ of the defendant, and was killed on the date and at the station alleged, while engaged as a conductor in interstate commerce.

Defendant further alleges that the said M. G. Toops was killed through no negligence, omission, inattention, or want of care on its part, or on the part of any of its officers, servants, agents, or employees, but that his death was due to his own negligence, omission, and want of care.

Defendant further says that the said Toops received the injuries which resulted in his death while in the employ of the defendant as a conductor, and that such injuries were the result of the risks of his empolyment, which were assumed by the said M. G. Toops, and for which the defendant is not liable.

Wherefore, this defendant prays for judgment against the plaintiff herein for the costs of this action.

Reply

The reply consisted of a general denial of the allegations of the answer.

Trial

The case came on for trial on February 26, 1927, and was tried to the court and a jury, the plaintiff appearing in [fol. 22] person and by her attorneys, Carr W. Taylor and James N. Farley, the defendant appearing by William Osmond and John S. Simmons, its attorneys. Following is an abstract of the material evidence given on the trial.

Plaintiff's Evidence

The plaintiff introduced evidence as follows:

Mrs. Mabel G. Toops testified (Tr. 4, et seq.): My name is Mrs. Mabel G. Toops. I am the widow of Conductor Toops. At present I am living at Lawrence. I was appointed administratrix of the estate of M. G. Toops by the Probate Court of Douglas County. At the time of the death of Mr. Toops his family consisted of myself, himself and our daughter. I am 37 years of age. My daughter is 17. Mr. Toops, at the time he was killed, was 37 years of age, would have been 38 if he had lived until Christmas Day of 1926.

Andrew P. Nolan testified (Tr. p. 6, et seq.): My name is Andrew P. Nolan. At the present time I am living in the Disabled Volunteer Soldiers Hospital at Milwaukee. Have been there since the 6th of December, 1927. Before that time I was a switchman and brakeman for about fourteen years, and worked for several different roads. I worked for them under the name of Andrew P. Nolan, which is my real name. I was working for the Santa Fe Railroad at the time Mr. Toops was killed under the name of John McHenry. I went to work for them on July 24, 1926, and was on the run between Dodge City and Elkhart. At that time there was quite a grain rush. I first met Conductor Toops on the 11th day of August at Dodge City in the ca-

boose. He came over to bring his clothing to the caboose so that it would be there when he went out. We made the run [fol. 23] from Dodge City to Elkhart and the sixteen hours' rest was up at noon the following day. We were called for duty at 8:00 p. m. the night of the 11th and left Elkhart about ten o'clock. The train crew consisted of Engineer Hall, Fireman Phillips, Conductor Toops, Rear Brakeman Hemphill, and I was head brakeman. Rolla is the second station east of Elkhart. In going down we did no switching at Rolla. To the best of my recollection we didn't stop there. We left Elkhart about eleven or eleven thirty at night on the 12th day of August. We picked up four empty box cars at Wilburton to take to Feterita. We arrived at Rolla that night between 12:15 and 12:30, with the same train crew. (Exhibit 1, being a map of the location of the tracks at Rolla, was introduced, and identifed by the witness as being correct.) The most northerly track is the passing track which is connected up east of the cross-over into the stock track. The stock track extended east from the cross-over switch. The main line track runs right along parallel with the passing track on the south side. The depot was south of the main track. The house track was the next track south of the station, right behind the station. The elevator track was still further south, the most southerly track of all. The directions of the tracks are east and west. On the south side of the railroad there was a hill and a cut. The hill has been cut away to put in an elevator track. It was a sharp curve and bore to the south.

The first thing we did was to take the engine and the four cars which we picked up at Wilburton and went in on the elevator track and got five loads of grain which were billed out, and came back to the main track, and Conductor Toops made the coupling. The next thing that was done was to cut off the engine and went east on the main line to the east end of the stock track. We had to get fifteen grain cars that were behind twelve stock cars on the pas- [fol. 24] sing track. The stock cars extended up past the pass-over switch. I went to the east end of the stock track and came back through the stock track and made the coupling and shoved the cars back to clear the cross-over. Mr. Hemphill made the coupling, and I opened the cross-over switches. There was a road crossing back there that was

cut. There was another coupling back between the engine and the road crossing. The road crossing was west of the depot about four or five car lengths. I opened up the main track switch, the cross-over switches, and we pulled out to the main track and Mr. Hemphill gave me the kick signal. There were 27 cars, 12 stock cars next to the engine, and 15 empty grain cars on the rear end of the cut. They were pulled out so we could make the switch and kick those 15 grain cars down to the elevator track. After we made the stop Mr. Hemphill gave me the kick signal and knowing where the cut was I watched for it to get back to me, and by the time it got to me the cars were moving about ten miles an hour, and I was slow about getting on and I missed the pin. I was slow on account of the condition of the track, there were weeds there and the tracks were skeletonized and bad footing along there. After he gave me the second kick signal I made the cut and then he swung down and gave the stop signal, and at that time I was just about back to where he was standing at the cross-over switch. The kick sign is a sign to kick the cars enough to start them so you can cut them off and let them roll on their own accord, and let them move themselves down past a clearance point so you can accomplish another move without handling those cars over again. It is faster than shoving cars. Mr. Hemphill was standing at the cross-over switch at the main line that leads back into the siding, back into the passing track. We next kicked the twelve stock cars back into the passing track and Mr. Hemphill went back with those on [fol. 25] the passing track. There was nobody on the fifteen moving grain cars when they were cut loose from the stock cars and speeded back on this elevator track. Nobody in control of them. They were not lighted in any way. There was no light on the west end of those fifteen grain cars that were moving west. There were no other lanterns visible to me as we kicked those cars except Mr. Hemphill's lantern, and it was purely by his lamp signals that I was working by, and I was unable to see Mr. Toops on account of the curve there and the cars pointing on this elevator track, wouldn't make it possible for me to see him if he was around the curve. It would make it impossible for me to see further than just the main track switch on account of that "L" and curve that is there. If he had been beyond that I couldn't have seen him from where I was working.

Mr. Hemphill's kick-in signal could not have been seen from the derail where Mr. Hemphill was standing. The signal couldn't have been seen from the derail where Mr. Toops' body was found. It couldn't have been seen from there to the cross-over switch where Mr. Hemphill was passing the signal from. There was no whistle signal given, and I don't believe the bell was rung. I wouldn't want to say for sure because the bell is something you can't very well hear if the cars are moving at the distance I was from the engine. It may have been ringing, but I don't remember if it was. The engine whistle wasn't blown at any time after we started switching in the yard until it was blown to call the agent after we found Mr. Toops' body. After Mr. Toops made the coupling of the five grain cars Toops and Hemphill came up toward the engine and we met there, and I read the switch list aloud. The instructions on the switch list said to get the fifteen empty grain cars behind the twelve stock cars off of the passing track and place them on the elevator track for loading.

The last that I saw of Mr. Toops he was around the depot [fol. 26] platform and it was at the time we were getting those twenty-seven cars while we were making the couplings on them, and at the time I walked up the line to the cross-over switch, I could see him around the depot. I noticed him a couple of times while the couplings were being made, and I noticed two lanterns down there. I wouldn't have known one from another any more than watching the lanterns and knowing who came out at the rear end of the cut. It was a dark night. I couldn't see any surrounding objects where Mr. Toops and Mr. Hemphill were with their lanterns. All that I had to go by was just the movement of the lanterns. I couldn't tell which was which, it was too dark. When I last saw Mr. Toops he was at the east end of the platform of the station. He was standing still and previous to that, a few minutes before, I saw him west of that, and I saw him move from there to the east of the station platform. I think he stopped in the neighborhood of the east end of the depot. That is the last place that I saw him until the time I saw his lantern lying on the ground and found his body under the tender of the engine.

When the stock cars were kicked in onto the passing track Mr. Hemphill went in with them. I then lined up the cross-over switches, that is on the main track, and walked to the inside cross-over switch and lined that over, and then walked to the east end of the fifteen grain cars that had gone in on this elevator track and gave the engineer a back-up signal, and made the coupling between the engine and the head car of the fifteen grain cars. The front end, or the head car of the fifteen grain cars, was standing about two car lengths west of the inside cross-over switch, when I made that coupling. By inside I mean the one that was between the stock tracks and the passing tracks. The switch west of the cross-over switch is about 60 or 70 feet west.

After I made the coupling I got on top of the head car and Mr. Hemphill was to the west giving the back-up signal. [fol. 27] I am sure he wasn't on the fifteenth car. I repeated the signal to the engineer and he started to back up. It looked to me as though Mr. Hemphill was going away from me walking westward on top of the cars, as though he were trying to get to the rear end of the fifteen car cut. Hemphill was on the top when I got to the top. I don't know at just what time he crossed over on account of the curve there, but he was on top at the time I got on top of the east car.

After I passed the signal the engineer started to back, and when we got to the point where we turned in off of the main track on the elevator track I saw Hemphill's lantern. I was standing on the second head car. I had walked from the head car to the second head car to get a better view of Mr. Hemphill, and it was better for the engineer to see me from the second car than from the head car, going around the curve. When I got back, where we were going off of the main line to the elevator track, I saw the lantern there and started yelling, and gave a violent stop signal, and the engineer came to a stop. I gave them an emergency stop signal. I saw the lantern lying in the thistles about three or four feet south of the south rail on the elevator track, and a few feet east of the derail, I will say three or four feet, and to the south of the south rail of the elevator track. I also saw the conductor's hat and lead pencil. The hat was a couple of feet from the lantern, and the pencil was

closer than that. The pencil wasn't more than a foot, and the hat possibly two feet from it, but they were right in front of the lantern so that the bulb of the lantern shone right down on them. The lantern was about three or four feet south of the south rail. I gave the signal because I knew that was no place for a lantern to be lying there on the ground, in a position like that, and because I had been trying to locate the two lanterns and I located the one on top, and the first I could locate the other was there on the [fol. 28] ground. That was the reason I gave the signal. When you see a lantern in that position it is an indication that something is seriously wrong, and a person would stop at once. That is the rule.

After I had given the emergency signal I got down off the car as quickly as I could and picked up Mr. Toop's lantern after I had marked the place where I had picked it up with my heel. I looked around the engine there and under the tank and saw his body, and saw his head on the outside of the rail, and his arm was cut off and lying a few feet west of his head and body. His arm was about three feet from the head. Both were on the south side of the rail. The body was right on top of the derail. His shoulders were right on top of the derail, his back down. He was lying at an angle with his feet to the east and the shoulders on top of the derail to the west, lying in an angling position in between the two rails. My lantern went out either when I was giving the stop signal or coming down the car, I don't know which. I was using an oil burning lantern at the time. I picked up Mr. Toop's lantern, which was an electric lantern with two bulbs. It was burning. If it hadn't been burning I never would have discovered him being there. (Witness identifies the lantern as being the lantern of Mr. Toops.) I yelled at the engineer and fireman. They were both on the engine and they both got onto the ground, and then Mr. Hemphill came a couple of minutes afterwards, after we stopped, so the whole train crew was there. Three wheels of the engine tender had passed over the body.

At the time that we coupled the engine to the fifteen grain cars they were two car lengths west of the inside cross-over switch, the east car was. To the best of my judgment the west end of those fifteen cars was about three

or four car lengths west of the derail, and that is before the fifteen cars were moved by the power of the engine. [fol. 29] The witness here identifies the rules of the A. T. & S. F. Ry. Co. and the plaintiff's attorney reads the following definitions:

"Station.—A place designated on the time-table by name, at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated."

"Yard.—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time-table, or by train order, may be made, subject to prescribed signals and regulations.

(Witness resumes:) There were no yard limit marks at that station.

Plaintiff here introduces the Book of Rules, calling special attention to Sections 102, 320, 473, 478 and 24.

Cross-examination:

I gave my evidence before the coroner's jury and signed it by the name of John McHenry. That was the name I was going under at the time. I signed a statement that was made out by Mr. Hemphill to Mr. Shull, the claim adjuster. I merely signed that statement as to the position of Mr. Hemphill. I wasn't vouching that the statement was absolutely correct. I didn't know about that. I am just here out of the hospital, and at that time I was in worse shape than I am just at the present time, as to my physical condition. I don't mean that my mind was impaired, but I was very nervous and I didn't look at things possibly in the right way. I was too sick to make out a statement and I told the claim adjuster to put a clause in the bottom of Mr. Hemphill's statement as to how I found Mr. Toop's body. About the first of this year or the last of last year, I gave my deposition in this case at Milwaukee. [fol. 30] I guess my mind was in about the same condition as it is now. I think that what I said at Milwaukee was a correct statement of what took place. Mr. Toops, the conductor, was in charge of the train. He had entire charge of the station and the switching operations. If a conductor

has other work in his line of duty, he does that, like writing up his bills or checking the cars that he is going to take with him on the train. He does that and leaves the rest of the crew to go ahead with the other work. If he tells me to do something as a brakeman, it is my duty to do it, and if he tells Hemphill to do something, it is Hemphill's duty to do that, and if he tells the engineer to do something, it is the engineer's duty to do it. The conductor has entire charge of the switching operations and the others simply work under him.

The first thing we did was to pull out the four empty cars that were intended for Feterita. They were the four front cars and moved east on the main line. We went to the elevator track and backed in on that track, about thirteen car lengths from the road crossing, I think. A car length is about forty-two feet, about one-eighth of a mile. That track is beyond the elevator switch. The elevator switch lays to the west, then we backed down the elevator track and picked up five cars, and attached these five cars just behind the four empties. I took the cars back in there and Mr. Hemphill cut across there and we got the nine cars together and Mr. Hemphill walked back over. I made the coupling on the head car. At that time Toops was coming up along the train as far as I know, from the caboose to the head end. I had been told by Mr. Hemphill when we left Willburton that on our arrival at Rolla to hold on to the four empty cars and pick up the five grain cars from the elevator track. Hemphill came over, I believe the five cars were all together. Mr. Hemphill had nothing to do with the making up of that train. After the grain cars were [fol. 31] attached to the empties we went east again and passed the main line switch. Then we backed down on the main line to the train and the conductor coupled those nine cars to the train. Then I detached the engine. After that I had the switch list and I read the switch list aloud with both Toops and Hemphill there. That was on the station platform. I saw Mr. Toops after that, that is I saw his lantern. I saw one lantern on the platform and one down along on the passing track where we were getting the twenty-seven cars out of there. Mr. Toops was on the platform the last time I saw him. His lantern looked as though it was in a setting position or held in his arm or somewhere

where it wasn't moving. A conductor will put his lantern on his arm if he is checking a train or anything, he puts it on his arm. It was standing still. I didn't see any movements. This platform is north and west of the derail. It must be about two hundred feet, maybe more, maybe less. It is south and east of the station. We had to put the stock cars back on the passing track where we got them, and the stock cars were in front of the grain cars. They were on the passing track but foul of the cross-over, so we couldn't get off the main line through the cross-over without going to the east end of the stock track. We had to bunch up the stock cars and push them back to the grain cars. The stock cars were all coupled together, but there was a little gap between them and the grain cars. There was one road crossing cut in the grain cars, otherwise they were coupled together. We picked them up and went east through the cross-over. As we shoved back there to make these couplings we got the cars and engine to clear the cross-over, so I could head through the cross-over, and we pulled them east then out onto the main line up over the cross-over switch and through the cross-over switch back, so we could kick the cars in towards the elevator track. I don't know just how far beyond the cross-over switch we went, I was [fol. 32] at another cut, but possibly a couple of car lengths, or three or four. We went far enough east so the whole twenty-seven cars had passed three or four car lengths over to clear the cross-over switch. That would put the engine about thirty car lengths east of the cross-over switch. I was on the ground on the south side about ten or twelve car lengths from the rear end. Mr. Hemphill was back there to throw the cross-over switch back after we got back over it. We kicked them toward the elevator track. The cars we were trying to kick were the fifteen grain cars which were on the west side of the cut. We were going to kick them toward the elevator track and did so. Then we kicked the stock cars back onto the passing track. That left the engine free of cars. I then lined up both switches, the cross-over switch, both the main track cross-over and the inside cross-over, and walked to the head of the 15 grain cars, just about two car lengths west of the inside cross-over switch, and the main track pointed toward the elevator track. It was then our intention to shove them back by

rolling them on the elevator track. Our instructions were to put them down there, spot some, and leave some up by the elevator and to shove some by, as the gravitation is east, and we were to shove some of the cars by the elevator and spot some by the elevator, and the rest of them would run down of their own accord as they needed them. It was while we were moving those fifteen cars intending to spot them by the elevator that I discovered Mr. Toops' lantern. At the time I was on the second head car. I had come off the east car, the head car, to the second head car, to be in a better position to be seen. I could pass the signals and see the signals from Mr. Hemphill better off of the second car than I could the head car, on account of the curve. From the time we coupled onto them and started shoving until we came to a complete stop, would be between 10 to 12 car lengths, that is the best of my judgment. The night [fol. 33] was dark. I could go out here in the yard and walk down the yard and come within a few feet telling how far I had walked. Any man that has been around cars could do that. It was not light enough to see how far the cars will go without walking back over the territory and having a judgment of how we had shoved the cars. I did that that same morning. I took no notes but I just satisfied myself as best I could as to how far it was from the derail, the best I could. We examined those fifteen cars that night. We walked back over them. The whole crew went back over them. I testified at Milwaukee that an examination of those cars showed blood on the wheels, on all but the last two cars. The thirteenth car was the last car that we found blood on. I found no blood on the car that was furtherest west. I found blood on all the other cars, on the wheels, the south wheels, little stains of it. There was no blood on the rails outside of right around the derail, that is all that I could see. Mr. Toops' body was lying on its back with his shoulders further west than the feet. The head was on the outside. Found nothing in the middle of the track. I never saw his book at any time. I didn't see the book. I wasn't there when they moved the body from under there, because I was so sick I couldn't hardly stand up. I went to the station and stayed there until after the body had been picked up. I was so nauseated by the sight that I simply had to quit. That night we caught

a train back to Elkhart. The cars we were placing on the elevator track were shoved back and left together on the elevator track. Our train was left at Rolla, put part of it in the shed and house track and filled up everything we could around there to get rid of the train and took the caboose and went right back to Elkhart. I stayed in Elkhart that day, then I threw up my hands and quit. After we had got rid of the stock cars and were spotting the grain cars, the engine was pushing them back, and there [fol. 34] was but one movement of the cars from the time we started to shove until we stopped, and I gave the wash-out signal. We were going about seven or eight miles an hour, I guess. We were going to shove those cars onto the elevator track about thirty-five car lengths. When we pulled out of the passing track with the twenty-seven grain cars, we took the fifteen grain cars towards the elevator track, and then after coupling the engine we shoved them on back. When I first saw the lantern I was just approaching it a little east of it, possibly within the two car lengths. When it stopped the engine was right on top of the body, that is the front trucks of it was on top of the derail.

Redirect examination:

The elevators were on south side of the elevator track. The most eastern elevator would be just a little west of the depot, the best I can remember. When we left the cars that night the grain cars were between the derail and the road. The couplings were all made and we just left them standing as they were. The track by the derail was just skeletonized. Skeletonized is where it isn't filled in between the ties; where it isn't filled in between and up even with the ties. There was very little ballast there. It didn't come over the top of the ties.

Recross-examination:

I am not saying that the track was wholly skeletonized. I say partly skeletonized. The ballast wasn't up even with the ties there in between the rails. There may have been a little bit of filling in there, but it was scant and hard to find.

(Witness examines defendant's Exhibit 5, attached to a deposition taken at Dodge City.)

That is a fair representation of the tracks. One can see up to the derail. (Witness also examines Exhibit 6.) This looks to me as though there was more of a growth of weeds around there than there is at this time. Outside of that I think the picture is fair. But I think there was a larger [fol. 35] growth of weeds there than what there is in the picture, but I might be mistaken about it. I mean that there seems to be more weeds there than is shown in the picture. Otherwise I think it is, to the best of my judgment, a fair picture. As to everything except the weeds, I think it is all right.

Defendant introduced in evidence Exhibits 5 and 6, to which there was no objection.

W. F. Hemphill testified (Tr. 55, et seq.): I live at Albuquerque, New Mexico, and am switchman for the A. T. & S. F. Railroad. I have been in the employ for about five years. In the month of August, 1926, I was working between Dodge City and Elkhart. Ran over that route about six months. I remember the occasion of Mr. Toops taking out the train from Dodge City in August, 1926. I had not known him before. We went out to Elkhart on August 11th. We left Elkhart the night of the 12th and reached Rolla close to 12:30 or 12:45. I was the rear brakeman on the train and my place would be in the way car. The position of the head brakeman would be with the engineer and fireman. Mr. Toops was with me in the way car that night. When we got into Rolla we stopped about thirty car lengths west of the depot. There were twenty-nine or thirty cars in the train, I don't remember the exact number. When we got out Mr. Toops went up one side of the train and I went up the other. It is customary to do that. The head end of the train was at the station. I don't remember whether the engine had been cut off then or not. It might have been on the train but possibly was coming back on the elevator tracks, I don't remember. Mr. McHenry got the switch list and I remember he read it over. I don't know whether it was before we picked up the cars or after. I think it was after we picked up the cars. That was about 12:30 or 12:45. The first service I performed that night I went across to the elevator where

[fol. 36] the five grain cars were. The elevator was west and south of the depot, and I assisted in picking up those grain cars. When we got the five cars together with the four cars, we coupled them together and then we went east to the east end of the elevator track, and shoved them back against the train on the main line. Mr. Toops made the coupling. After that I gave the signal to back up and then waited until the engine went by me and walked across to the passing track. That was before the coupling was made. I had seen Mr. Toops down there and I didn't go down at all on that side of the train. Then I walked across to the cars that were on the passing track. I was about twenty-two or twenty-three car lengths from the engine, possibly one hundred feet west from the depot. I made the coupling of those cars back there at the crossing, I mean where the road crosses the tracks, that is all the coupling I made. I think there were either five or six cars west of the crossing and the balance were east of it, about twenty-seven cars all together. I didn't get up on the cars after they were coupled. I rode on the side of the car on the safety appliance. I came back past the depot and saw Conductor Toops. He was standing at the east end of the depot. There was a railroad truck there and he had the bill book and lantern on the truck. It was at the east end of the depot. The next time I saw him he was lying under the tender of the engine. As I rode by him that was the last time I saw him on the platform. I could see the bill book and he had it in his hand. He was leaning over it with his elbows on the truck. When I saw his body by the derail he had nothing in his left hand. I did not help take him out. When we pulled this string of twenty-seven cars off of the passing track we pulled them through the cross-over switch to the main line. Fifteen of them were grain cars. I threw the switch and gave the kick signal to the en-[fol. 37] gineer and I saw McHenry get on the cars, and I figured he had time to lift the pin, and I gave the stop sign. He was slow getting on, he had his lantern, I suppose, in the wrong hand or something, and didn't get to the pin as soon as I thought he would, and he didn't cut them loose. When the slack run out of the cars I knew they weren't cut off and gave another signal so he could cut them off. It was the kick signal, back-up signal. McHenry pulled the pin and I gave the stop signal. The fifteen grain cars went to the

elevator track. The front end of those fifteen grain cars stopped about two or three car lengths from the cross-over switch of the main line. I do not know that there was anybody on those fifteen grain cars when they were separated from the stock cars. There was no light on the cars. There was no light on the west end of the west car. After that I threw the switch to line up with the passing track. I threw the cross-over switch. I gave the cut-off sign and the kick sign for the stock cars. I caught those cars and rode them into the passing track and tied them down. They were cut off in response to my cut-off signal. The engine remained on the main line when those cars were kicked. I can't give you a definite answer as to how far I rode the stock cars before I applied the brake. I was setting the brakes all the time. I moved from one car to another and I set two or three brakes. The stock cars possibly stopped just about even with the depot, probably about the west end of the depot. I was probably about the middle of them, about six cars. I got down off the car just as they stopped and I walked across to the elevator track and got on those box cars. I crossed at about even with the platform, just a little bit east of it. When I got across I got on top of the grain cars, I mean the fifteen cars that had been kicked in. I was possibly two or three car lengths from the derail. I did not see Conductor Toops nor his lantern. I had my lantern. Mine was an electric lantern. When I got on top [fol. 38] of those cars and looked around and seen that the engine hadn't coupled on to these cars, I started walking to the west end of them, walked possibly one or two car lengths, and I felt the engine couple on and I gave the back-up signal, to come west. I don't think the first signal was obeyed, I don't think anybody saw it. I didn't see any lantern but I just took a chance that the engineer would see it but apparently he didn't. Anyway he didn't move. There is quite a curve there. There was a bank there six or eight feet high between me and the engine, not as high as a box car. I don't think the first signal was observed. When I saw McHenry coming on top of the car I saw his lantern and gave the signal. I didn't pay any attention to what he but the cars commenced to move to the west so he undoubtedly saw the signal. I got hold of the brake staff with both hands and the slack ran out of the cars and it almost throwed me off the cars. I thought we went out

of sight and the engineer had stopped and before I looked up I gave another back-up signal, and when I looked up I seen a lantern right on top of the car give a violent stop sign and I knew there was something wrong. I figured McHenry was hurt and was getting off from on top of the car. The brake I think that I took hold of was on the last car near the west end. There were no lights in the yards. There were no switch lights on any of the engines. There were no yard limit signs around there. When McHenry was getting down off the top of the car I figured there was something wrong and I started to run up the east end of the car. I possibly ran over ten or twelve cars before I got off. I was within three car lengths of the engine, and I think McHenry was between me and the engine, and he hollered that we cut Conductor Toops' head off. I got down, I saw his hat lying beside, at one side of the track, three or four feet from the rail, and his head and his right arm. McHenry showed me where his lantern was laying; [fol. 39] he had his lantern in his hand and he showed me where it was laying close to his hat, about a foot. I didn't see the lantern when I got up on top of the cars. I stayed in the center of the cars. I then looked around there for Mr. Toops' body, and it was between the rails lying flat on his back, with his shoulders lodged against the derail, catacornered between the two rails. The feet were east of the shoulders. I saw the place possibly fifteen minutes after it was taken out. There was an indication that it might have been dragged possibly two feet, just a little gravel and stuff scuffed up there. It looked as though the body might have been turned over. I didn't see anything in his left hand. His train book was lying between the rails on the track. There were about thirty-four or thirty-five bills inside of the train book. The train book was not bloody. The first person to examine the body after it was found was a doctor at Elkhart, or at Rolla, he was the first one to touch his body. I think I picked up the train book, but I am not positive. They were possibly two or three feet away from his hand. I think they were on the east side. When I got on top of those fifteen cars there was nobody else on top so far as I saw. There wasn't any lantern there. If there had been a lantern up there I would have seen it unless the person had it behind him or hid in some way. You could see any one with a lighted lantern on top of any of

those fifteen cars. When I gave the signal for the kick-in and it was made, there was no signal that I know of given by the engine nor the bell, that I heard.

Cross-examination:

The last time I saw Mr. Toops before his death, he was standing at the east end of the platform station on the platform. I did not at that time have any talk with him. Before that I had talked with him. He was coupling up the air hose on these four or five cars that we picked up that were coupled onto the train, he was coupling the air hose [fol. 40] up on them and I walked down the south side of the passing track to this crossing to make that joint, and while Mr. McHenry was bringing the engine through the stock track I was standing at the crossing on the north side of the main line talking to Mr. Toops; he was on the south side of the main line, and he asked me if these fifteen cars were all in one cut and I told him they were and that I would kick them all into the elevator track. He said, "All right, I will look out for them." And that was the last, I think the last words that I heard him speak. That is the last thing I said to him. These cars were to be divided among the different elevators. From there I don't know where Mr. Toops went. I never saw him any more until we found him. The kick signal is almost the same as the back-up signal, only faster. A kick of cars is getting the cars rolling at such a speed that you can stop the engine and the cars will roll on under their own power and go where you want them. That is the usual and ordinary way of placing cars in the yard. When you are placing cars with a kick it is not the ordinary custom for anybody to be on those cars with a lantern to warn the other trainmen, unless you are kicking them over a public road crossing.

Q. When you are kicking them over a public road crossing, is the presence of some one on the train for the protection of the co-employes or for the protection of the public?

A. The public.

By Mr. Taylor: We move to strike out the answer.

By the Court: Yes; the answer is stricken out. The jury will not consider it. Exception allowed.

(Mr. Hemphill resumes:) We examined the wheels of the cars. It was dark and we had nothing but a lantern. We didn't crawl under and examine any of them very closely, [fol. 41] that is under the wheels, and if I remember right it was the twelfth car from the engine that we found blood on the wheels that night. I examined again in daylight and I think there was blood on the fourteenth car from the engine and none that I remember seeing on the fifteenth. There was nothing on the track to indicate how far, if at all, the body had been rolled or dragged. The gravel was a little scuffed and looked like it might have been turned over and dragged possibly two or three feet. I think Mr. Toops was right handed. This note book of his was lying to the east. His left hand was to the west and the book was to the east. The lantern at the spot where Mr. McHenry showed me his heel mark, was possibly three feet from the track. The side of the car would extend about eighteen or twenty inches from the rail. I do not know how long the lantern was lying there. It couldn't have been over fifteen minutes at the very outside. It couldn't have been over ten or fifteen minutes from the time I was talking to him until he was found under the car. I was on the north side of the car and the lantern was on the south side. That would be the reason I would not see it. I don't know of anybody being on the south side while we were standing there. The engineer had not been as far west as that.

Redirect examination:

There may have been a path down the main line on the south side but it was eight or ten car lengths from the end of the platform where I last saw Mr. Toops to where we found him dead on the tracks. I do not think that it was less than two hundred feet; it might have been, but I do not think so. I do not think it was contrary to the rules to run a string of cars, that is to kick a string of cars in at night without a lantern on the end of them.

Q. I will ask you what the rule books says about that.
[fol. 42] A. The rule book says that in shoving or making up cars, you don't have to have a man there. It may not express it in those words but that is what it means.
Q. I will ask you if it doesn't read as follows:

"When cars are pushed by an engine (except when shifting or making up trains in yards), a white light must be displayed on the front of the leading car by night."

A. That is it exactly.

Recross-examination:

This movement of a train was shifting and making up a train.

Redirect examination.

Rule 102 reads as follows:

"When cars are pushed by an engine (except when shifting and making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need."

I gave my deposition at Dodge City in this case. I don't remember whether I testified then as to any conversation I had with Mr. Toops, I don't remember whether it was brought up or not. When I made out the statement to the claim adjuster, it was in there. I don't think that I testified to it in a deposition. I still am in the employ of the A. T. & S. F. Railroad Company.

F. R. HALL testified (Tr. p. 79, et seq.): I reside at Dodge City. I am a locomotive engineer. Have been for eight years. On August 13, 1926, I was operating an engine on the western division between Dodge City and Elkhart. At that time I had been running over that branch about a month and a half. I had been acquainted with Mr. Toops about fourteen years. That was Mr. Toops' first trip as conductor of that train that fall. On the return trip from Elkhart we arrived at Rolla on the morning of August 13th. I was in charge of the engine. Mr. Phillips was my fireman. [fol. 43] I went to supper with Mr. Toops the night before. The first thing Toops said was "Tomorrow is Friday the thirteenth, watch your step." We arrived at Rolla about 12:20 a. m., if I remember right. I remember pulling a string of cars out on the main line track at Rolla. I received a kick signal there with reference to the fifteen grain cars

on the rear of that string. I do not know positively who gave me the signal. I obeyed it. After we had kicked in the fifteen grain cars on the elevator track we kicked the stock cars onto the passing track. Then we coupled up to the fifteen grain cars again. The east end of those grain cars was about two car lengths from the cross-over switch connecting with the main line. I received a signal to back up after I had coupled onto the cars. I could not see a brakeman on the rear end of the cars or down near the middle of that string of fifteen cars. From the engine cab I could not see anyone standing on the ground. There was an obstruction there in a bank, probably five or six feet high. I didn't see any lantern thrown out of any kind, I couldn't have seen it.. It was a clear night, but dark. I knew Toops very well. His disposition was cheerful.

Cross-examination:

I could not see the movement of the cars. I could see the lantern. If I had had a lantern I could have seen the movement of the cars possibly a short distance. I suppose you could see with a lantern when you were coming to a track. I don't know, I didn't have any lantern down there. I don't really know how far these electric lanterns throw, I don't use one of them. Engineers don't use lanterns. I suppose you could see a short distance, but I don't know exactly how far you could see. It is usual for the engineer to give a signal when he is starting up a train on a kick signal. It is the general practice of an engineer when he gets his signals from a brakeman or switchman, he goes ahead and makes the kick.

[fol. 44] I have known Mr. Toops for a long time. I knew him when he worked on that division before in the summer of 1913. I worked with him. There had been no particular change in the location of the track, or the way in which the tracks were built, or the switches, in that time, none that I know of.

Redirect examination:

There was a curve there that made it impossible to see around to the back end of the fifteen cars.

Q. I will ask you if it isn't one of the rules of the company in a case of that kind, that an engineer will, in round-

ing all curves where the view is obscured, sound the whistle, using the signal prescribed in Rule 14 (1). That is on page 15 of this book. You knew that to be the rule, didn't you?

A. Yes, sir.

Q. And the whistle is prescribed to be two long and two short blasts?

A. Yes, sir.

Recross examination:

That rule refers to the operation on the road. In this case I didn't know where the cars were going to, it was dark. There was a curve there but I didn't know that the cars were going around this curve.

The deposition of WILLIAM J. PHILLIPS was then read in evidence (Tr. p. 89 et seq.)

My name is William J. Phillips. I reside in Pueblo, Colorado. My occupation is that of a locomotive fireman. In May, 1926, I was working for the C. & W. Railroad running a switch engine at the steel works, but in August I was working on the Santa Fe out of Dodge City on the Elkhart branch. On the night of August 12th we were coming east out of Elkhart. M. G. Toops was conductor. The head brakeman was McHenry and the rear brakeman was [fol. 45] Hemphill. Fred Hall was engineer and I was fireman. I had worked on several branches of the Santa Fe. If I remember right that was either my first or second trip on this Elkhart branch. It was the first trip for the conductor. I would say there were twenty-five or thirty cars on the train. We arrived at Rolla probably about 12:30 or 12:45. The train stopped west of the station. The engine was even with the depot or not more than a car length east of the depot. I think we picked up the switch list, there is always one out there. We had some switching to do. We cut the engine off, went down there in on the elevator track, got four or five cars, put them on the main line; went to the east end of the passing track. There was stock cars on the east end of the passing track. We had run back on the main line and put some more cars onto the train. We went

to the east end of this passing track, there was stock or grain cars there. There were a few openings between there and we had to back them up and couple them. Ten or twelve grain cars had to come out and go on the elevator track; we pulled the cars out and kicked whatever grain cars had to go back on the elevator track; we stopped and backed these stock cars onto the passing track and left them. We backed them over the cross-over switch. We come out of there and got these cars, grain cars. After we kicked in those stock cars our engine was just even with the cross-over switch. The head brakeman lined up the main line switch. When we lined the main line switch, the engine did not go over one or two car lengths until it coupled onto the cars. The east end of the fifteen grain cars on the main line was just in the clear off of the cross-over switch where it connects with the main line. I could not see the end of the train when I was seated in the engine. I was on the left hand side. I remember when the train started back. I saw the head brakeman give a back-up sign, and then when we got on the curve I saw [fol. 46] this wash-out sign and hollered to the engineer. That is a violent stop signal. The engineer stopped at once, the train did not go over half a car length. I can not remember whether there were any signals given or not before the engineer started backing. The bell was ringing at the crossing. After we got to the switch, I don't remember whether he shut the bell off or not, it was an air bell. I don't remember whether there was any whistle blown when I started backing. The bell was rung by the engine. I had no cause to ring it by the rope myself. I do not remember that there was any bell rung or whistle sounded. When the train stopped I heard the brakeman holler, "We have killed the conductor." I went on the engineer's side and the tender was over his body. I noticed his head was lying to the south of the track. His lantern was burning. He had two globes on it, the biggest was burning. That is the way McHenry found him. His hat was to the side. I remember the head, the hat and the lantern. There was an arm, but it was pretty well mangled up. When we found his body there we got down and saw he was dead, so the engineer got back on the engine and whistled the operator out. While he was doing that one of the brakemen went to

the operator's house, got the operator out; he opened the depot, got the dispatcher at Dodge City and said we had killed Conductor Toops and he was under the engine. The dispatcher wired to take the body out. Hall and I said there was a coroner at Rolla; they got the coroner; when they got him he pronounced him dead and took the body out. We got orders to put the train away. We put the body in the way car and went to Elkhart. We got orders to put the train away. We put the train on the passing and part of it on the house track; it was a job to put it all away. There were no switch lights at Rolla. I do not remember of ever seeing them there. There are one or two at Elkhart. [fol. 47] We found Toops' body about 1:05 or 1:10 in the morning. It was a clear, dark night, awfully quiet. When the trainmen had their lanterns you could see them, but in the dark it was pretty dark. When I saw the violent stop signal I could see a lantern at the far end of the string of cars. I figured it was the rear brakeman. That was at the west end of the cars. I did not pay any attention to him until I got on the curve and saw the brakeman give the violent stop signal. I could not say who was on the back of that string of cars, all I could tell was McHenry. He was on the first car next to the engine—on the very west, and I could not tell—all I could tell was a light on the car. I did not see any of the crew until we got on the cars and started backing. It looked to me as though Hemphill's position was on the fifteen cars. When I saw that light on the back car we had only gone a couple of car lengths. I did not see where Conductor Toops was while we were doing the switch. When the cars started down the elevator track there was quite a curve. You could not see from my side, the south side of the train. You could see the north side of the train on the west end when they started to back, up to where they took the curve. I can't say whether there is a rule providing for placing a light on the rear end of a string of cars where there are no switch lights.

Cross-examination:

It is not the habit to whistle while switching in the yards. So far as the bell is concerned we ring it at the crossing, that is all I remember. It might have been ringing and it might not. There are some switching lights at Satanta, and

some at Elkhart. These are the only ones on the Elkhart branch. We were pushing the fifteen cars to the west. When we found out about Mr. Toops being killed we made an examination of the fifteen cars to see whether there were any marks to indicate what car had struck him. It seemed to have been the second car from the went end. There was [fol. 48] blood on that car. We looked at the other cars to see whether there was blood on them. It was on the trucks of the second car, the first pair of trucks on the second car, the front trucks as we were going. We made an examination of the track and it did not look as though he had been dragged. It seemed to me he was twisted about, lying on his belly. On the coroner's inquest, I was asked: "Do you know how he met his death?" and I answered "No." That is true. There was nobody about except the train crew. We could find no markings on the rear car to indicate that Toops was struck by the rear car.

Redirect examination:

I don't recollect whether we stopped at Rolla doing down to Elkhart or not. The examination we made was that night. I made it in person with a lantern and torch. I could have seen blood spots. I never got clear under the car for the purpose of examining it. There was no blood on the wheels. I examined the track east of the derail for several feet. There was no ballast between the tracks outside of dirt ballast. The conductor's lantern was lying about three or four feet south of the track. The hat was about the same distance. I did not notice whether the conductor had any papers in his hand. I do not know whether there was any considerable clearance between the top of those ties and brake beams. There is always some clearance. I do not know how many inches it is. Toops had an electric lantern and a good one. If Toops had been on top of the train I believe his lantern would have been visible to the other trainmen on top of the cars. If he had been on either side of the track it would have been. There would be nothing to prevent the trainmn on top of the cars from seeing him, if they had been looking.

[fol. 49] Frank Algeo testified (Tr. p. 111, et seq.): I am a railroad conductor working for the Santa Fe. The

rate of pay is $6.16 a hundred miles with a guaranteed mileage of 3,800. The wages would figure around $230 to $240.

Cross-examination:

His pay check would depend on how much he had worked. I have no idea how much he earned, whether he worked all the time or not. I don't know what he had done for two years preceding his death.

JUDD BENSON testified (Tr. 114 et seq.): I am a life insurance agent for the Equitable Life of New York. (It was admitted that the Mortality Tables would show that at the age of 37 years Mr. Toops would have an expectancy of 30.4 years, and Mrs. Toops at the age of 36 would have an expectancy of 31.1 years.) Mr. Benson continues: My company has figured out by tables the amount which invested now would return a monthly stipend for any certain given number of years. I have such table I have it for thirty years. That would return a monthly sum of money.

Q. Assuming, for the purpose of this question, that the evidence shows that Mr. Toops contributed to Mrs. Toops and her daughter the sum of $125.00 per month; that her age at the time of his death was thirty-six years; that she had a life expectancy of thirty-one years; that his age was thirty-seven at the time of his death, and that his expectancy was thirty and four-tenths years; that he was strong, able-bodied, and in good health; that the evidence shows his disposition to contribute toward his family was good; what amount of money, if paid now, would make a return to Mrs. Toops and her daughter of $125.00 per month for the period of her expectancy, which in this case *if* thirty and one-tenth years?

(Defendant objects to the question as to what amount [fol. 50] of money would be required now to pay such a sum. It would depend upon the worth of money in this community and it is not what a man could buy an annuity for from an eastern life insurance company.)

By the Court: Overruled; exception allowed.

To yield $125.00 a month, according to the life annuity table, for a male at that age, is $26,489.00, $125.00 a month. That is based upon a three and one-half per cent rate of interest.

Cross-examination:

I am not an authority. I am not pretending to figure this out myself. I simply use the annuity table which is on a basis of three and one-half per cent. I am not able to say what it would cost to buy an annuity of the same amount on a basis if money was worth six per cent, I haven't those figures, or five per cent, or four per cent; three and one-half per cent is the only basis that my table shows. That is the rate fixed by my company.

Redirect examination:

It would probobly take a day and a half to figure out the rate at six per cent.

Mrs. Mabel G. Toops, recalled, testified (Tr. p. 121 et seq.): I had not seen Mr. Toops for about three or four weeks before his death. I think it was about four weeks. He was in perfect health so far as I know. He was about five feet eleven and one-half, weighed about 155 or 160. He contributed I should say $133 to $140 per month. He received $115 to $125 every two weeks.

Cross-examination:

I never figured out what he received for twelve months period prior to his death. He had been at work all the time for several years. I never figured out how much he made a year. What he paid included the expense of a house, we were paying for our home. We were paying $40 per month on it. Our home is at Kansas City, Missouri.

[fol. 51] James N. Farley testified (Tr. p. 127 et seq.): (Witness identifies Exhibits 7 and 8, certain photographs taken in the summer of 1927.)

I. R. Bryan testified (Tr. p. 136 et seq.): I live in Texas County, Oklahoma, about two miles from the Kansas line. On the morning of August 13th I was at Rolla with a load of wheat. I went over and looked over the track. I had known Mr Toops about twenty years before his death, and was intimately acquainted with him. I noticed the condition of the track by the derail with reference to whether it was ballasted or not. There is no ballast in there. The ties were just laid on the ground, just like laying brick on top, some places there was a little, maybe a gallon of dirt between the ties, and some places there wasn't any; just steel laid on top of them, and spiked down. There were a few thistles growing around there.

Cross-examination:

I am a farmer. I said there was only about a gallon of dirt between the ties just down the center of the ties. It was that way right along in lots of places, and of course in some places there might have been more. By the derail there were some places that were ballasted some. (Witness examines defendant's Exhibit 6, and said: "Well, it looks like the tracks there. I don't see any dirt at all between those ties in the picture. We were trying in our own mind to figure out if there was anything that caused the accident, anything like that, just walked down the tracks. There may have been other things than the lack of dirt. He could have caught his foot on a spike. There is a spike sticking in there just close to where he laid on the inside of the rail. It isn't drove down, it wasn't a couple of weeks ago. It is right close to where he was lying between the rails. I didn't see anything to indicate that he fell on a spike, but he was there and the spike was there.

[fol. 52] Company Rules

Sec. 102. When cars are pushed by an engine (except when shifting in making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need.

Sec. 320. Trainmen and yardmen, before switching or moving cars at stations, must ascertain that there are no

persons or property on or about the same that might be injured or damaged by so doing.

Sec. 473. They will, in rounding all curves where the view is obscured, sound the whistle, using the signal prescribed in Rule 14.

Sec. 478. They will use great care in backing up to take a train, or backing into a siding to take or leave cars, and will approach so slowly that couplings can be made without injury to persons or property.

Sec. 24. When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night.

The plat agreed upon at the trial, and the photographs identified by the witnesses for the plaintiff, are filed with the Clerk of the Supreme Court, and reference is hereby made to the same as though formally set out in this abstract.

DEMURRER TO EVIDENCE

This concluded the evidence for the plaintiff to which evidence the defendant demurred for the reason that said evidence did not make out a cause of action against the [fol. 53] defendant. After argument said demurrer was overruled by the court (Tr. 135).

Thereupon, the defendant introduced the following evidence:

DEFENDANT'S EVIDENCE

TOM BROWN testified (Tr. 136, et seq.): I live at Williamsburg, Kansas. In the summer of 1926 I lived at Rolla and was in charge of an elevator there. Rolla is a place of a couple hundred population. I remember the night that Mr. Toops was killed. I was there ten minutes after he was killed. There was no indication that his body had been moved by the time I got there. The engine was still there. After I got there they would not move the engine

until we got a doctor or a coroner. Mr. Toops' body was lying between the rails with his shoulder lying on the derail. The derail was open and the shoulder lying on top of the derail. The head was lying just south of the south rail entirely severed, and one arm was entirely severed. He was lying on his back, breast up. His feet were further east than his shoulders. We aximened the trucks of the freight cars that night and then made another examination the next morning. We found no marks of blood on the first car. The first marks of blood we found on them were on the west end, west wheel, on the south side of the second car. Following these cars up to the engine, we found blood on every wheel, blood and flesh on every wheel up to the tender, up to and including the tender.

Cross-examination:

I crawled under the cars the next day, just under the first two. I made this examination at the request of Mr. Shull, the claim agent of the Santa Fe, and Doc Ellis. It was made in the morning. Dr. Ellis was the doctor that was called before we moved the body, before anybody would touch it. The doctor requested that we look the [fol. 54] ground over thoroughly because we would all be called, and that we would more than likely be called on the coroner's jury. I could not say whether Dr. Ellis is a Company physician.

Redirect examination:

I do not know whether he was the coroner, but he is a physician who lived at Rolla at that time. We crawled under the two west cars. There was nothing on the brake beams of the second car showing anything where he had been rolled. We examined the cars and examined the brake beam, of only the first two cars. I don't know whether there was anything on the brake beams on the third car or not, I didn't look. I do not know whether anybody was under there between the time we looked at them with the flash light at the time of the accident and when we crawled under there next day.

J. R. McGovern testified (Tr. p. 142 et seq.): I have been working for the Santa Fe Railroad for thirteen years as

a roadmaster. I am familiar with the situation on the Dodge City-Elkhart road. On that road the track is a dirt track, dirt ballast. I know what a skeletonized track is. A skeletonized track is rails and ties only; rails spiked to the ties. We have no skeletonized track on the Dodge City-Elkhart branch, and never have had except where we are working. After we have completed the track we have no skeleton track. A dirt track, after it is surfaced, the center of the track is filled in with dirt; between stations we generally fill it in high, as high as the top of the rail, to shed water. In yards and station grounds the dirt is filled in level with the top of the tie, and the ends of the ties are left bare, so as to shed water. That is the kind of track we had in the station yards at Elkhart, or at Rolla. There is no signal lighting system in the stations on the Elkhart branch. I was down at Rolla in August, [fol. 55] 1926. The conditions of the tracks at that time was known to me. The rough weeds were cut away from the track; the center of the track was filled in between the ties.

L. A. Arthur testified (Tr. p. 146 et seq.): I live at Dodge City. I am a brakeman for the Santa Fe and have been a conductor on the extra gang. I have been in the employ of the Santa Fe for fifteen years. I worked on the Dodge City-Elkhart branch in 1914. I worked from the 5th of August, 1914, to the 5th of May, 1915, and Mr. Toops was working at that time. We did work all along at the stations along that branch, including the station at Rolla, and Mr. Toops was engaged in the same work. The only change that I can think of in the condition of the yards at Rolla is that they have connected up the west end of the elevator track to the main line, that used to be a spur. There were no switch lights there when we were working, and there have been none installed since that year. When we were engaged in switching in the yards it is not the practice to have a man on the rear end of the train, or a string of cars that you are backing, to warn other trainmen, and at night it is not the practice to have a man at the rear end of the string of cars with a lantern to warn other trainmen, unless there

is a public crossing. The track at Rolla is just the usual house and elevator track. A skeleton track is one that has no dirt in it or about it. The track at Rolla is what I would call center fill. The ends of the ties were exposed to drain the water out from the center of the track.

Cross-examination:

I have had no conference with the attorneys about my tstimony in this case. I don't know why I was brought down as a witness, I was sixty miles from the accident. I have been brakeman for fifteen years. I know the difference between a yard and a station as defined by the [fol. 56] train rules. We apply "yard" to any place where you switch or make up trains. A station is where you receive and discharge passengers. A yard is defined by yard limits. We apply the rules that we have in actual service. I do not know of any yard limits at this station, and I haven't been out there for some time. It was in 1914 and 1915 that he was my partner on the Elkhart branch. I have worked at Rolla since then. I don't know that Toops has. He relieved me as conductor on that branch. So far as I know that was the only trip he made at that time.

J. B. Robinson testified (Tr. p. 151 et seq.): I am a railroad conductor, working on the Elkhart line. I have been there continuously since 1915. I knew Conductor Toops. When I first knew him he was a brakeman. He was working with me in 1915. He was on the run when I went out there as brakeman with Mr. Arthur. He was transferred some time in the fall of 1915. I know the condition of the track at the station of Rolla, and have known them practically ever since 1915. My interpretation of a skeleton track is a track where the dirt has been dug out from the ties for the purpose of raising the track, or laying new track, where they spur out bunk cars or material cars, where they lay track that is on top of the ground with spikes and rails and ties. At Rolla there is the usual house track and the elevator track. I would call it center filled or dirt filled, like the dirt track that they have on that line all the way through. It is not the usual practice

in switching cars for anyone to ride the cars unless it is necessary to stop them short for an obstruction.

Cross-examination:

There is quite a curve at Rolla and when we are driving a train into the elevator track from the main line track east of that, driving it into the west, it is impossible for the engineer or the head brakeman or the brakeman on the north side of the car to see what is going on at the end of [fol. 57] the train. A fireman can take a signal from the north side of the main line. If there was any employe of the Santa Fe Railroad Company that had any idea that there was anyone in danger, they would stop immediately and not back in any place. It is the custom that is observed by the Santa Fe to kick cars without having anybody in control of the cars, where they roll of their own gravity. One conductor might handle his work one way and another another way. I handle cars the way I have told you. In switching movements we do not put a light on the end at night and never have unless I was riding back to make a coupling and going across a crossing.

Q. You don't try to protect anybody?

(Defendant objects.)

By the Court: Overruled; exception allowed.

I have been running a train for twenty-two years and I have never had anyone hurt, not even a finger mashed on either a brakeman or myself. I told you that under certain conditions I am always on the rear end of the train if it is required, but in switching movements, and that is what I understood you were talking about.

This completed the defendant's evidence.

PLAINTIFF'S EVIDENCE IN REBUTTAL

In rebuttal the plaintiff introduced the following evidence:

Dr. H. J. DUVALL testified (Tr. p. 160): I am a practicing physician. Have been for thirty-one years. In a crushing

injury where a railroad car wheel or railroad engine mashes off a member, it mashes up the tissues so bad, including the blood vessels, that there isn't any bleeding immediately following it, like there would be if it was cut off with a sharp instrument.

And this was all the evidence introduced by either plaintiff or defendant.

[fol. 58] MOTION FOR DIRECTED VERDICT

The defendant moved the court to direct the jury to bring in a verdict for the defendant for the reason that the evidence did not warrant a judgment for the plaintiff, which motion was by the court overruled.

After the introduction of all the evidence, the Court gave the following instructions:

INSTRUCTIONS OF THE COURT

1

GENTLEMEN OF THE JURY: This is an action brought by Mrs. Mabel G. Toops, Administratrix of the estate of M. G. Toops, deceased, as plaintiff, against The Atchison, Topeka & Santa Fe Railway Company, as defendant, wherein the plaintiff seeks to recover damages for the death of her husband, M. G. Toops, for the alleged negligent acts of the defendant causing his death on the 13th day of August, 1927, at about one o'clock a. m., at Rolla, Kansas.

Plaintiff further alleges that for approximately eleven (11) years prior to the said 13th day of August, 1926, the said M. G. Toops, deceased, was in the service of the defendant, first as brakeman and afterwards as a conductor; that the said M. G. Toops as such conductor on the evening of August 12, 1926, was in charge of a freight train made up of and containing many cars of freight for transportation from Elkhart, Kansas, and other stations on said line to Dodge City, Kansas, and to points outside of

the state of Kansas; that the said freight train arrived at Rolla, a station on defendant's line situated in Morton County, Kansas, northeast of Elkhart, Kansas, at about 12:15 a. m. on the morning of August 13, 1926; that said [fol. 59] conductor M. G. Toops was in full charge of said train and had received orders to take up five (5) cars of grain, four (4) of which were billed to Kansas City in the State of Missouri and were therefore interstate shipments; that these cars were standing on what is known as the elevator track in the yards at Rolla, Kansas; that the said Conductor Toops and the train crew switched five (5) loaded grain cars from said elevator track to the main line of said railroad and placed same into said interstate train for transportation to points in other states; that the said M. G. Toops had further orders to set in on said elevator track for loading with grain for interstate shipment fifteen (15) grain cars which were standing upon what was known as the passing track, the norther-most track in said yards at Rolla, Kansas, and just west of approximately fifteen (15) stock cars also standing upon said passing track; that they caused the engine on said train to back up on said passing track and couple with said stock cars, back said stock cars to a coupling with said grain cars, then pulled said stock and grain cars out on to the main line track, and lined the switches up to divert the cars to the elevator track. That while the engine and the twelve stock cars and the fifteen grain cars were on the main line track and the switches were thus lined to lead onto the elevator track, the rear brakeman, Hemphil, being at that time on the south side of the main line track and east of the cross-over switch, gave to the engineer a kick-in signal; that said kick-in signal was negligently, carelessly and recklessly giden in that at the time it was given, Hemphill did not know the whereabouts of Conductor Toops, did not look to see where he was, and that if he had looked he would have seen Conductor Toops and could have given him a signal or warning that the kick-in was about to be made; that without ascertaining the whereabouts of Toops, Hemphill gave to the engineer the kick-in signal and the engineer in obedience thereto [fol. 60] started to propel his engine backwards with the intention of shoving the fifteen grain cars on down the

main line track and on to the elevator track; that Hemphill remained on the ground at the cross-over switch when the cut or kick-in should have been made and thereby divert the twelve stock cars back over on to the passing track; that the head brakeman, Nolan, during this time was on the south side of the track and four or five car lengths east of the cross-over switch at the passing track, and his duties, after the kick-in signal was given, were to make the cut between the twelve stock cars and the fifteen grain cars and allow the grain cars to be kicked in onto the elevator track as aforesaid. That the track at this point and throughout the entire length of all of the tracks in Rolla, Kansas, is very dangerous in construction; that the same was negligently and carelessly constructed by the defendant company, its officers, servants, agents and employes in that it is skeletonized, that the surface of the ground next to the tracks is full of holes and pitfalls and had been allowed to grow up with weeds, and that the same was extremely dangerous and insecure to the workmen trying to operate trains of the defendant. That because of this dangerous condition of the track and its environs, the head brakeman, Nolan, was unable to get on the train being backed as aforesaid in time to make the cut before the slack of the cars had run out; that he was therefore unable to make the cut and separate the fifteen box cars from the twelve stock cars. It thereby became necessary for Hemphill to give the second kick-in signal, which he did, and the engineer in response thereto gave the cars a second kick; that at this time the entire train was moving at a speed of ten miles per hour. In response to the second kick-in signal Brakeman Nolan was able to make the cut and the fifteen grain cars were separated from the engine and the twelve stock cars, and were kicked down the main line and in onto the elevator track.

[fol. 61] Plaintiff alleges that the operation of said train as above described was a reckless, careless and negligent manner of operating said train on the part of the defendant, its officers, servants, agents and employes, in this, to-wit:

That at no time from the time the first kick-in signal was given by Brakeman Hemphill, was anyone on these fifteen grain cars, until such time as shall hereinafter be set forth.

That at no time during the operation of the train just described was Brakeman Hemphill or Brakeman Nolan in possession of knowledge of the whereabouts of Conductor Toops, although in the exercise of ordinary care they could have known of his whereabouts; that at no time was any signal given by the engine or engine crew to Conductor Toops of their intention to kick in said fifteen grain cars; that no whistle was blown; that no bell was rung; that there was no light on the west end of said fifteen grain cars; that no brakeman or flagman was on the west end of said moving cars to give warning of the approach of the same onto and westward down said elevator tracks, that the tracks at Rolla, Kansas, at the point where the elevator track connects onto the main line track, make a very decided curve to the south; that there is a high bank at this point on the south side of the track and that the view from the derail on the elevator track to the cross-over switch to the passing track is cut off; that the hill on the south side is eight or ten feet high; that the track at this point was skeletonized and was in a very dangerous condition as has been heretofore described; that the published rules of the defendant company provide that when cars are being pushed by an engine as hereinbefore described, a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need except when shifting or making up trains in yards. And the plaintiff alleges that there are no yards at Rolla, Kansas; that there are no yard limit boards in or near [fol. 62] Rolla, Kansas; that there was no switch lights and no one was on duty at night to assist in making switches or handling trains through said station; that all of these facts were well known to the members of the crew operating the train at the time of the death of Conductor Toops.

Plaintiff alleges that Conductor Toops after having coupled the air upon the five grain cars which had been put into the interstate train on the main track, walked over to the east end of the depot and to a truck which was standing there, where he remained for a few minutes going through his order sheet; that as soon as he had completed that work, he proceeded east approximately 325 feet along the main line track and to a point north of the derail on the elevator track; that he was the conductor and in charge of said

train; that as such conductor it was his duty to assist in spotting cars and switching the train; that his proper position was on the right side or the engineer's side of said train, which in this case was the south side; that in order to reach the south side of the train it was necessary for him to go south and cross the elevator track; that Conductor Toops carefully, cautiously and while in the line of his duty, proceeded to cross said elevator track at a point three or four feet east of the derail on said track with the intention of placing himself in a position to assist at setting the cars to the elevators thereon; and that he was in the exercise of his duty in proceeding as above described; that the elevator track at this point, as has been heretofore described, was skeletonized and negligently constructed and in a dangerous condition; that the only light Conductor Toops had was the electric lantern which he carried in his hand; that it was necessary for him to carefully watch his footsteps; that just as he stepped on said elevator track, he was without warning struck by the west end of the fifteen moving grain [fol. 63] cars which had been negligently, carelessly and recklessly kicked in onto the elevator track by the engine crew in the manner hereinbefore described.

Plaintiff further alleges that said elevator track was negligently constructed and maintained by said defendant, its officers, agents, servants and employes in this, to-wit:

That at the place where Conductor Toops was killed on said elevator track, it was what is known as a skeleton track; that is, the railroad ties of the approximate dimensions of 6 inches thick, 8 inches wide and 8 feet long were laid on top of the ground, and the rails being approximately 4¾ to 5¼ inches high, were placed on top of the tiles, the distance between the rails being 56 inches; that the ties were placed on the ground 8 to 10 inches apart. That no earth or ballast of any kind was placed between or over the ties, and that this construction made said tracks unsafe for trainmen, especially at night in said unlighted yards; and that because of the space between the rails and the ties being vacant and unballasted, they were a trap and a snare for trainmen passing from one side of the track to the other; all of which was unknown to the said M. G. Toops, deceased.

And plaintiff alleges that said negligent and dangerous construction of said track as above described was one of the contributing causes of the death of the said Conductor Toops, and that it was well known to the defendant, its officers, agents, servants and employes that said track was of the said skeleton construction, and was dangerous and insecure and was a snare and a trap to those crossing said track and more especially to those crossing said track in the night time.

Plaintiff further alleges that at all the times hereinbefore mentioned, the said Conductor Toops at said Rolla, Kansas, was carrying an electric lantern which gave forth a bright light, and that said lantern was plainly visible to his fellow [fol. 64] servants except when said Conductor Toops passed behind the west end of said string of box cars; at which time his lantern was burning brightly; that it was the duty of the trainmen operating said train to observe the whereabouts of their fellow workmen, which at night are indicated only by their lanterns; and that it was the duty of the fellow servants to give signals to move said train only when the whereabouts of their fellow workmen were indicated by their lanterns; that the defendant, its officers, agents, servants and employes were guilty of negligence in this, to-wit:

That when the engine crew received the signal from the head brakeman who had given it without knowledge of the whereabouts of Conductor Toops, to kick in said string of grain cars for spotting at the elevators on the elevator track, the crew failed to ring the engine bell and failed to give the usual back-up or kick-in signal by whistle, and kicked said cars in onto the elevator track without giving any warning whatever to Conductor Toops that said train was about to be kicked westward; and that notwithstanding the fact that the night was very dark and that there were no lights in or near the tracks at Rolla, Kansas, to light up said elevator track, they kicked the cars as aforesaid and left them to roll in onto the elevator track of their own momentum with nobody on said cars or in charge thereof to give warning, and no lights of any kind or nature on or near them, and no warning of any kind or nature whatever of their approach.

Plaintiff alleges that as Conductor Toops in the line of his duty started to cross the elevator track as hereinbefore

described, he was struck by the kicked-in cars as aforesaid, kicked in and operated by the defendant, its agents, officers, servants and employes, in the negligent manner hereinbefore described, and was knocked to the ground between the rails in the manner hereinbefore described at a point about three or four feet east of the derail on said elevator [fol. 65] track; that his body was dragged along the ground between the tracks until his shoulders came to rest against the derail; that his head and right arm had fallen in such manner that they lay across the south rail of the elevator track and were severed from his body by the wheels of the rear car of said kicked-in cars; that when struck he threw his lantern to the south side of the track as a signal to the engine crew and brakeman to stop said cars; that there was no brakeman on said cars and the engine was not attached thereto and his signal was unobserved and met with no response; that his lantern lodged in the weeds and grass two or three feet from the rail; that he thereby met his death, and the sole and only causes therefor were the negligent, careless and reckless acts of the defendant, its officers, agents, servants and employes in constructing the track at Rolla, Kansas, and allowing it to be and remain in the condition it was in at the time and place hereinbefore mentioned and described.

Plaintiff alleges that at the time Conductor Toops was struck by the kicked-in cars, they were proceeding quietly and not at a high rate of speed but at a rate of speed sufficient to carry them two or three car lengths beyond the place where Conductor Toops was struck and killed; that the enginemen after having kicked in the cars as hereinbefore described threw the crossover switch leading from the main line to the passing track and set the twelve stock cars back on the passing track, then took the engine back onto the main line track and proceeded to back into the fifteen grain cars on the elevator track for the purpose of setting them to the elevators; that Rear Brakeman Hemphill rode the said twelve stock cars over to the passing track and set the brakes on them; that he then walked from the passing track over to the elevator track and climbed upon the fifteen grain cars at a point four or five car lengths from the place where Conductor Toops was lying dead; that he climbed up [fol. 66] on top of said cars and gave the back-up signal to

Head Brakeman Nolan, and Nolan in turn repeated it to the engineer, and the train was pushed backwards; that after giving the back-up signal Hemphill proceeded to walk in a westerly direction on top of the cars and towards the rear end of them; that Nolan walked to the second car from the engine and to the south side thereof in order to be in a position to see around the curve on the elevator track and better observe Hemphill and his signals; that just as the car upon which Nolan was standing was passing the derail, Brakeman Nolan saw the lighted lantern of Conductor Toops lying in the weeds, gave a violent signal to stop, and the engineer stopped the train as soon as he could, but not until after the train had proceeded westwards until the tender of the engine was over the body of Conductor Toops.

Plaintiff further alleges that by reason of the negligence of said defendant, its officers, agents, servants and employes as hereinbefore alleged, said Conductor Toops met his death in the manner and form set forth and to the plaintiff's damage as hereinafter stated.

Plaintiff alleges that the said Conductor Toops was 37 years of age at the time of his death; that he was a healthy, cheerful, active, able-bodied man, and as a conductor was earning approximately the sum of Two Hundred ($200.00) Dollars per month; that his expectancy of life was approximately 30.35 years, according to the American Experience Table of Mortality; that at the time of his death, his widow, Mabel G. Toops, was of the age of 36 years and had an expectancy of life of approximately 31 years; that the said Marthelle G. Toops, his minor daughter, is of the age of 16 years; and that said widow and daughter were his sole and only heirs; that he died intestate; that said widow and daughter were dependent upon him for their support and maintenance; that they have no income, or property of their own from which they could derive support or income; that [fol. 67] by the untimely death of said M. G. Toops, occasioned by the negligence of said defendant, its officers, agents, servants and employes, in the manner and form hereinbefore alleged, plaintiff's beneficiaries were and are damaged in the sum of Thirty-six Thousand Dollars ($36,000.00), for which sum plaintiff prays judgment.

The defendant answers, denying each and every material allegation and claim made by plaintiff, and admits that it

is a corporation engaged in interstate commerce, and that M. G. Toops, deceased, was a conductor in the employ of the defendant and was killed on the date and at the station alleged while engaged as a conductor in interstate commerce.

Defendant alleges that the said M. G. Toops was killed through no negligence, omission, inattention or want of care on its part or on the part of any of its officers, servants, agents or employes, but that his death was due to his own negligence, omission and want of care.

Defendant further says that the said Toops received the injuries which resulted in his death while in the employ of the defendant as a conductor and that such injuries were the result of the risks of his employment which was assumed by the said M. G. Toops and for which the defendant is not liable.

2

The jury are instructed that the law provides that every common carrier by railroad, while engaged in commerce between any of the several states or territories, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of death of such employe to his or her personal representative, for the benefit of the surviving widow and children of such employe for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employes of such carrier.

[fol. 68] In this case the liability, if any, of the defendant is for the benefit of the surviving widow and child of the said M. G. Toops.

The law further provides that where such injuries have resulted in his death, the fact that the employe may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employe.

3

The jury are instructed that the burden is on the plaintiff to prove, by a preponderance or greater weight of all the evidence in the case, that she is entitled to recover in this

action, and that in order to recover the plaintiff must prove, by a preponderance or greater weight of the evidence, that the death of the said M. G. Toops was the direct and proximate result of the alleged negligence of the defendant or its employes.

The jury are further instructed that the burden is on the defendant to prove, by a preponderance or greater weight of the evidence, the alleged contributory negligence of the said M. G. Toops.

By a preponderance or greater weight of the evidence is not necessarily meant the evidence of the greater number of witnesses but is meant such evidence as taken in connection with all the facts and circumstances in the case best satisfies the minds of the jurors.

4

The jury are instructed that if you find that the death of the deceased was the proximate result of the alleged negligence of the defendant's employes, and you further find that said injury and death were not due to the risk of danger [fol. 69] which he had assumed, as defined in these instructions, and you further find that the deceased was not guilty of contributory negligence, then your verdict will be for the plaintiff; if you also find that the deceased was guilty of contributory negligence you will then consider the question of contributory negligence for the purpose of determining how much the damages should be diminished by reason of such contributory negligence, and deduct from the amount of damages found such amount as you believe, from the evidence and the instructions herein, should be deducted on account of the contributory negligence of the deceased.

5

The jury are instructed that by the term "proximate cause" is meant that which naturally leads to and might have been expected to be directly instrumental in producing the injury and death, and by the term "proximate cause" is meant that result which naturally and ordinarily follows as the direct result of the act or omission under consideration.

In order for the injury and death to be found to be the proximate result of any specific negligence it must be found that such injury and death would not have occurred except for such negligence.

6

The jury are instructed that the alleged negligence of the deceased hereinbefore referred to is what is known in law as contributory negligence; and contributory negligence implies two things, first, a want of ordinary care on the part of the person injured, and second, approximate connection between this want of ordinary care and the injury complained of.

7

[fol. 70] The jury are instructed that ordinary care means such care as a person of ordinary prudence would exercise under the same or similar circumstances, and the failure to use such ordinary care is negligence.

8

The jury are instructed that the defendant railway company is not an insurer of the safety of its employes, and is not liable for mere accidents, but the defendant is liable in damages only in case you find that the defendant, its servants or employes were negligent, as alleged by the plaintiff, and that the negligence of the defendants or its servants or employes was the proximate cause of the death of the said M. G. Toops; and in this case if you find that the said M. G. Toops was negligent and that his negligence contributed to his death you will then reduce the amount of recovery in accordance with Instruction No. —.

9

The jury are instructed that an employe such as the deceased was, assumes the risk of danger incident to the occupation in which he voluntarily engages so far as these dangers are not attributable to the employer's negligence, and no recovery can be had on account of any injury which was the result of such assumed risk, but that the employe has a right to assume that his employer has exercised rea-

sonable care and he is not to be held as assuming the risk arising from sudden and unfor-seen circumstances not ordinarily incident to his employment. The risk assumed by an employe is the risk of such danger as the employe is aware of or a danger which is so plainly observable that he may be presumed to have known of it, and in order to [fol. 71] hold an employe for an assumption of risk attributable to the employer's negligence, it must appear not only that the employe knew of the risk caused by the negligent act of the employer, but that he knew it endangered his safety, or that such dangers must have been so obvious that an ordinarily prudent person, in the exercise of ordinary care under the circumstances, woud have appreciated such dangers.

10

The jury are instructed that while the deceased M. G. Toops assumed the risks of inherently dangerous methods of doing the work of switching and making up trains, he did not assume any increased risk attributable, not to the method, but to negligence in pursuing it.

In this connection you are further instructed that if you believe from the evidence that the said train at the time of the injury to the deceased, was being made up in the ordinary method and that the deceased was acquainted with said method, then the deceased assumed the risk attributable to the method of making up such train but did not assume the risk of increased danger by reason of negligence in pursuing a known method of making up the train.

11

The jury are instructed that the observance or non-observance of the rules of the defendant company as to the operation of its train, is not conclusive as to the negligence or care of the defendant company or its employes but is only a circumstance to be taken by the jury for what they may think it is worth in determining whether or not the defendant's employes were negligent in the operation of said train at the time in question.

[fol. 72] 12

The jury are instructed that it was the duty of the defendant company in operating its said engine and cars in and upon the tracks at Rolla, Kansas, to use ordinary care to protect the said M. G. Toops from injury, and to furnish a reasonably safe method and place of work; and in determining what would constitute such care you have a right to take into consideration the kind and situation of the cars, the manner in which they were switched onto the elevator track, the position occupied by the said M. G. Toops, the speed of the engine and cars, the time of the day or night, the light or darkness of the night, the ability to see and discern the movement of the cars, the position of the other members of the train crew; whether or not there was a member of the crew or a light on the front or west end of the cars moving onto the elevator track, and every fact and circumstance in evidence relating to the question including the condition of the tracks at Rolla, Kansas; and if you believe from the evidence and all the attending and surrounding circumstances and conditions that the means used by the defendant company, its agents and employes, as disclosed by the eivdence, did not constitute ordinary care on the part of the defendant and its agents and employes, then such failure would constitute negligence on the part of the defendant company.

13

The jury are instructed that the love of life in every human being is so strong that the presumption in this case is that the deceased did all that a reasonably prudent person would have done, with his knowledge of the situation, which presumption is controlling, unless you find that the evidence shows that he did not do all that a reasonably prudent person should have done. In other words every [fol. 73] man is presumed to exercise ordinary care for his own protection such as is exercised by an ordinarily prudent person, unless there is evidence to the contrary, and you will follow this rule.

14

The jury are instructed if you find for the plaintiff in this case, that the measure of damages is the pecuniary

value of the life of M. G. Toops, deceased, during its prospective continuance and is brought for the benefit of some certain person or persons, to-wit, in this case, the wife and daughter of M. G. Toops, deceased. It is purely and entirely a money or financial loss. How much money has Mrs. Toops and her daughter been deprived of by reason of the death of their husband and father, computing the same at its present worth or value? It is not a question of how much the father could have made for his own use had he lived out his allot-ed time, but is the present value of the sum his wife and daughter might reasonably have expected to receive from his earnings during their life for the limit of time within which they could expect to receive financial aid from their husband and father during the time they could reasonably be expected to live. You must not undertake to give the equivalent of the value of human life. You will allow nothing for the suffering or sorrow of either Mr. Toops, or Mrs. Toops, and her daughter. You must not attempt to punish the railway company, but endeavor to give a fair and reasonable pecuniary value for the continuation of the life of the deceased to his wife and daughter. Therefore, you will consider what sum of money paid at the present time in a lump sum would represent the fair value of what the wife and daughter had a reasonable right to expect under all the circumstances to receive from the earnings of their husband and father had he lived until their [fol. 74] death. As a basis upon which to make your estimate, it is proper for you to consider the wages which Mr. Toops was receiving, his age and health, what portion of his earnings he was devoting to the care and maintenance of his wife and daughter. You will consider his habits, his prospect of life, his industry and skill, the business in which he was engaged, and his hazards as to life. You will consider how much of his earnings he spent on himself either for necessities or for purposes as distinguished from what he spent for the maintenance and care of his wife and daughter because the part of his wages that he spent on himself or for purposes other than those that contributed to the care and support of his wife and daughter, would be entirely eliminated from your calculations.

There is another limitation upon the amount that you will allow for damages and that is this: You will allow only the present value of what you may find the wife and daugh-

ter have lost in money because of the death of their husband and father, for they are receiving now in a lump sum that which they would have received from time to time during a future period if Mr. Toops had not been killed. By this you are not to understand that you are to ascertain the number of years that the contributions to Mrs. Toops and her daughter would probably continue and then multiply such number of years by the amount of such probable yearly income, but you are to give a sum of money that will represent the present value of such contributions. The evidence you have heard as to the probable duration of life of Mrs. Toops and her daughter based on the mortality tables of insurance companies, is not conclusive upon the question of the duration of their lives. Such tables are submitted to you, not to control you but merely to guide you. They are based upon averages and there is no certainty that any person will live the average duration of life. [fol. 75] If you find that the defendant company, its agents, servants or employes, are chargeable with negligence, you should first consider the question of damages without relation to the question of contributory negligence. If you find that the plaintiff's intestate was guilty of contributory negligence, it would then be your duty to reduce the amount of damages in proportion thereto since the law under which this action was brought provides that the damages shall be diminished in proportion to the amount of negligence attributable to the injured employe.

I instruct you that this instruction means this: If you find that the negligence of the railway company and Mr. Toops is equal, that is, that the railway company was guilty of negligence, and the plaintiff's intestate was guilty of equal negligence that contributed to the injury, you will reduce the damages one-half. If you find that Mr. Toops was guilty of more negligence than the railway company, then the damages should be reduced by more than one-half; and if you find that he was guilty of less negligence than the railway company, then the damages should not be reduced as much as one-half.

15

Certain questions will be submitted to the jury which you will answer and sign by your foreman in case your verdict is for the plaintiff.

The jury are instructed that in answering these questions you will be governed solely by the evidence in the case without regard to your general verdict.

16

The jury are the sole and exclusive judges of all the facts in the case and of the credibility of the witnesses; you have the right in determining the weight and value of the evidence to take into consideration the feelings, motives, pas- [fol. 76] sions and prejudices of the witnesses, their interest in the result of the suit, where any is shown, their manner on the stand while giving their testimony, their memory and knowledge of the things about which they testify, and every fact and circumstance in evidence and occurring at the trial, which tends to contradict or corroborate any witness, and then give to the several parts of the evidence such weight as they seem to merit.

VERDICT

On April 25, 1928, the jury returned a verdict in favor of the plaintiff and against the defendant for the sum of $22,750.00, and also made the following

SPECIAL FINDINGS OF FACT

Q. No. 1. Was M. G. Toops, the deceased, in charge of the train and switching operations at and before the time he was killed?

A. No. 1. Yes.

Q. No. 2. a. Was M. G. Toops killed by coming into contact with the fifteen grain cars that were being placed on the elevator track?

b. If you answer the preceding question "Yes," state which car, if any, struck Toops.

A. No. 2. The first car on west end of the fifteen grain cars.

Q. No. 3. Were there any marks of blood on the rear car of the fifteen grain cars?

A. No. 3. There was no direct evidence to show there was or was not.

Q. No. 4. Were there marks of blood on the south wheels of all the other grain cars except the rear car?

A. No. 4. Yes.

Q. No. 5. Did Toops know of the coming on the elevator track of the fifteen grain cars?

A. No. 5. He knew they were to come.

[fol. 77] Q. No. 6. Was Conductor Toops supplied with a good lantern?

A. No. 6. He had a good lantern.

Q. No. 7. If you answer Q. No. 6 in the affirmative then state if he could have by the aid of said lantern seen the approaching cars.

A. No. 7. No.

Q. No. 8. Had not Toops formerly worked on the Elkhart branch from Dodge City to Elkhart?

A. No. 8. Yes.

Q. No. 9. Had the yards at Rolla, Kansas, been materially changed since he worked on said line?

A. No. 9. We don't know.

Q. No. 10. State fully in what the negligence of the defendant consisted, if any.

A. No. 10. First, in not protecting rear end of fifteen grain cars; second, in engineer not sounding signal when starting.

Motion to Set Aside Special Finding

The defendant filed a motion to set aside the answer to special qeustion No. 7 for the reason that the same was contrary to and not supported by the evidence. Overruled.

Motion for Judgment Notwithstanding the Verdict

The defendant moved the court to render judgment in its favor notwithstanding the verdict, because all the evidence in the case shows that plaintiff was not entitled to recover. Overruled.

[fol. 78] MOTION FOR A NEW TRIAL

Within three days after the rendition of the verdict the Railway Company filed its motion for a new trial upon all the statutory grounds. Overruled.

JUDGMENT

On May 26, 1928, the court rendered judgment in favor of the plaintiff and against the defendant on the general verdict of the jury.

The foregoing is a true and correct abstract of the record in the above-entitled case.

SPECIFICATION OF ERRORS

The District Court erred,

1. In the admission of certain evidence offered by the plaintiff over the objections and exceptions of the Railway Company.

2. In overruling defendant's demurrer to the plaintiff's evidence.

3. In rejecting certain evidence offered by the Railway Company.

4. In overruling defendant's motion for a directed verdict.

5. In giving certain instructions to the jury.

6. In overruling defendant's motion to set aside answer to Special Question No. 7.

7. In overruling defendant's motion for judgment in its [fols. 79 & 80] favor notwithstanding the verdict.

8. In overruling defendant's motion for a new trial and in rendering judgment in favor of the plaintiff and against the defendant on the general verdict of the jury.

William R. Smith, Owen J. Wood, Alfred A. Scott, Alfred G. Armstrong, All of Topeka, Kansas; Wm. Osmond, of Great Bend, Kansas, Attorneys for Appellant.

[fol. 81] File endorsement omitted

[fol. 82] In Supreme Court of Kansas

No. 28,499

Mabel G. Toops, Administratrix of the Estate of M. G. Toops, Deceased, Appellee,

vs.

The Atchison, Topeka an Santa Fe Railway Company, Appellant

Counter Abstract of Appellee—Filed Jan. 7, 1929

Appellant's abstract of the testimony introduced in this case is correct except as to several important matters, and for that reason we have made the following counter abstract:

Mr. Nolan testified (T. 51) that the elevators were located on the south side of the elevator track; that the elevator farthest east was just a little west of the depot; and that to the best of his recollection there was one ele- [fol. 83] vator on each side of the road crossing. Nolan was called back in rebuttal, and appellant has failed to abstract his rebuttal testimony. It is set forth in the transcript at page 158. He testified that there was a road crossing right west of the depot, and that it was a crossing which they were required to keep open.

Jud Benson testified on page 118 of the Transcript in answer to a question as to what difference the rate of interest would make in the amount required for an annuity, as follows:

"A. I believe I do have some tables, come to think about it, at my office, at four per cent, but that probably wouldn't add to the thing any It would probably be $150 difference in the entire table. One-half of one per cent would probably make that much difference.

Q. You say it would only make a difference of about $150.00?

A. Yes, sir; that is about it."

I. R. Bryan, a witness for the plaintiff, testified as follows (T. 132):

"Q. Where is that photograph we introduced yesterday, attached to the deposition. (Procures deposition.) Now, I will ask you to look at this photograph, Defendant's Exhibit 6, and state whether that shows about what the condition was there?

A. Well, it looks similar to the tracks there; yes, sir.

Q. That is your idea of what a gallon is?

A. I don't see any dirt at all between those ties.

Q. You don't see any dirt at all between those ties?

A. No, sir; I don't.

Q. What would you call this? (Indicating.)

A. I would call it weeds.

Q. Now——

A. In other words, thistles."

[fol. 84] The testimony of J. B. Robinson, one of the defendant's witnesses, is as follows (T. 155):

"Q. You would not consider you were doing your duty to back them in where the trainmen couldn't see the end of the train, would you?

A. We usually try to keep in touch with each other.

Q. Do you consider it your duty to back a train in where you couldn't see the end of that train and could not know whether there was anyone on the track or not?

A. I would back a train—If I knew that the track would hold ten cars and I had five, so far as the hazard was concerned, why, I don't think that it would be necessary to walk back to the end of the train. That isn't the practice.

Q. It isn't the custom to back cars in where you can't see the end, without somebody to protect whoever might be on the track, whether there is a roadway there or not, is it?

A. No, sir; it isn't."

The findings of fact returned by the jury as set forth both in Appellant's abstract and in its brief, are correct except-

ing only No. 10, which question and answer should read as follows:

QUESTION No. 10 AND ANSWER

"Q. No. 10. State fully in what the negligence of the defendant consisted, if any.

A. No. 10. 1st, in not protecting rear end of 15 grain cars. 2nd, in engineer not sounding signal when starting to back cars around curve and through cut. 3rd, poor condition of track at derail switch."

EXCERPTS FROM RULE BOOK

The following are definitions and rules taken from the Rule Book introduced in evidence:

Definition of a station (Rule Book, page 6):

"Station.—A place designated on the time-table by name, at which a train may stop for traffic; or to enter or leave [fol. 85] the main track; or from which fixed signals are operated."

Definition of a yard (Rule Book, page 6):

"Yard.—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time-table, or by train order, may be made, subject to prescribed signals and regulations."

Rule 24 (Rule Book, page 18).

"When cars are pushed by an engine (except when shifting or making up trains in yards), a white light must be displayed on the front of the leading car by night."

Rule 102 (p. 30):

"When cars are pushed by an engine (except when shifting and making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need."

Rule 320 (p. 65):

"Trainmen and Yardmen, before switching or moving cars at stations, must ascertain that there are no persons or property on or about the same that might be injured or damaged by so doing."

Rule 381 (p. 72):

"Conductors of freight trains are required to do their work thoroughly at stations, bearing in mind that trains are run to do the business of the road and not merely to make time over it. Trains, however, are expected to run with regularity and as nearly on time as the prompt performance of work and rules will permit."

Rule 396 (p. 76):

"They must do such switching as shall be necessary in taking cars for their own trains or in leaving cars from the same. Local freight trains are generally to do necessary switching at stations, but any freight train may, in case of necessity, be called upon by Station Agents for such work, and the same will be performed. Conductors when at stations doing work will at-end personally to the switch-[fol. 86] ing unless engaged in checking the unloading of way-freight as provided in Rule 389, when they may allow Brakeman, if competent, to do the switching."

Rule 398 (p. 76):

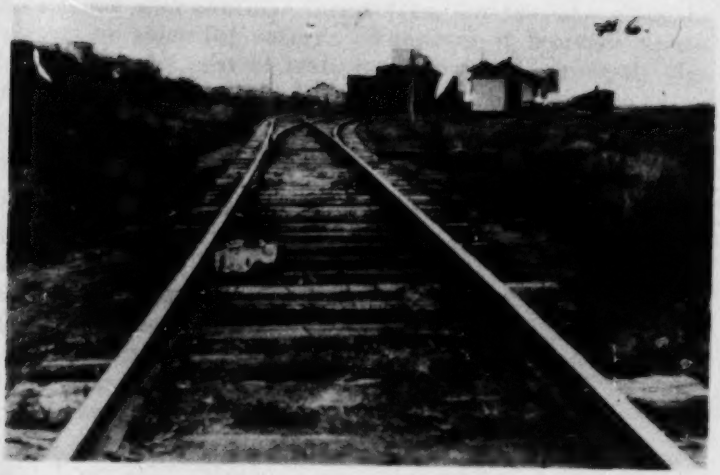
"When cars are taken on at intermediate stations, they must be carefully examined. They must see that cars already on siding, as well as those set out by them, are safely and properly left. Cars or engines must always clear the main or other adjoining tracks a safe distance."

Rule 471 (p. 85):

"They must know (so far as possible) that switches are right before attempting to pass or use them, and particularly acquaint themselves with location of derailing switches and know they are right before at-empting to pass them."

Rule 473 (p. 85):

"They will, in rounding all curves where the view is obscured, sound the whistle, using the signal prescribed in Rule 14 (1)." (Rule 14 provides for two distinct whistles.)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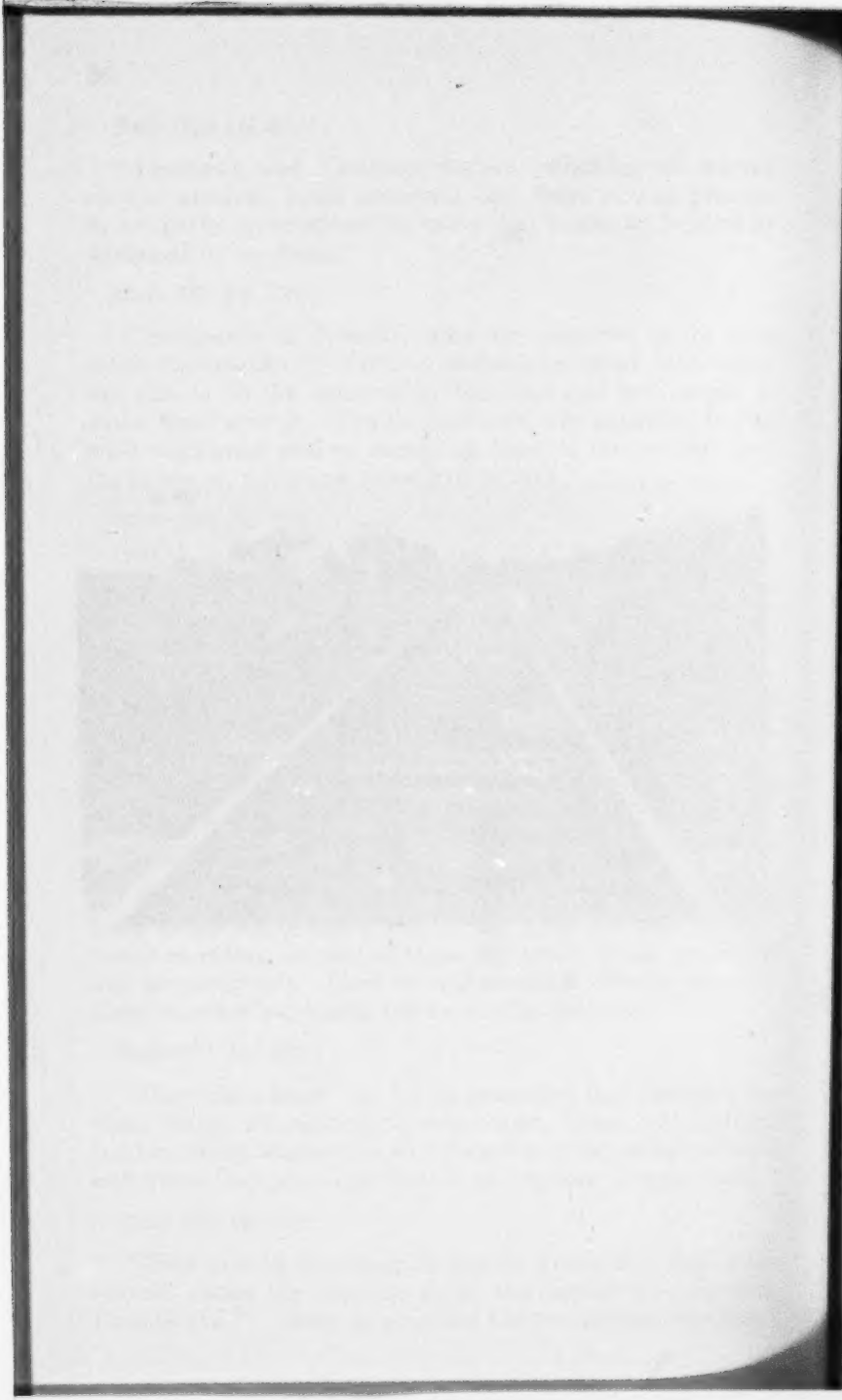


Rule 478 (p. 85):

"They will use great care in backing up to take a train, or backing into a siding to take or leave cars, and will approach so slowly that couplings can be made without injury to persons or property."

Rule 483 (p. 86):

"They will take into consideration that the lives of passengers and trainmen, as well as the property of the company, are entrusted to their care, and it is fully expected and required that they will not only attend to all signals and instructions, but also that they will, on all occasions, be vigilant and cautious themselves, not trusting alone to signals or rules for safety. Whenever it becomes necessary to protect rear of train engin-man will promptly signal flagman as per Rule 14 (c)."

Appellant's abstract omits the following re-direct examination of Mr. Hemphill (T. 76):

[fol. 87] "Q. I will ask you if Rule 102 doesn't read as follows: 'When cars are pushed by an engine (except when shifting and making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need?'

A. I think it reads that way; yes, sir.

Q. That is the rule?

A. Yes, sir; I think so."

Exhibit 6, identified by Mr. Nolan (T. 53) and by Mr. Bryan (T. 132), we believe should be before the court, and we are therefore attaching a copy of that exhibit.

EXHIBIT No. 6

(Here follows exhibit)

[fol. 88] The foregoing picture taken by the Railroad Company immediately after the accident, was taken looking westward along the elevator track from a point about 15 feet east of the derail where Conductor Toops' body was found. It also shows a part of the high bank along the south side of the track, about which the witnesses testified. Appellee's Exhibit 5, we believe also shows clearly the

layout out the tracks at the station of Rolla, and we are attaching a copy of that exhibit.

EXHIBIT No. 5

(Here follows exhibit)

[fols. 89 & 90] This picture was taken by the appellee sometime after the accident happened, but there had been no changes made in the yards at the time it was taken. It was taken from a point east of the cross-over switch, and shows the cross-over switch, the high bank on the south side of the track, and the elevators on the elevator track toward which the switch operations were directed. It shows the station house at Rolla and gives a very clear idea of the general layout of the tracks over which the switching operations were being conducted.

The transcript in this case has been filed with the Clerk of the Supreme Court, and the various exhibits have been at-ached thereto for the use of the court if necessary.

The foregoing is a true and correct abstract of the record in the above entitled case.

Carr W. Taylor, James N. Farley, of Hutchinson, Kansas, At-orneys for Appellee.

[fols. 91 & 92] Minute entry of argument and submission January 10, 1929, omitted in printing.

[fols. 93 & 94] IN SUPREME COURT OF KANSAS

No. 28,499

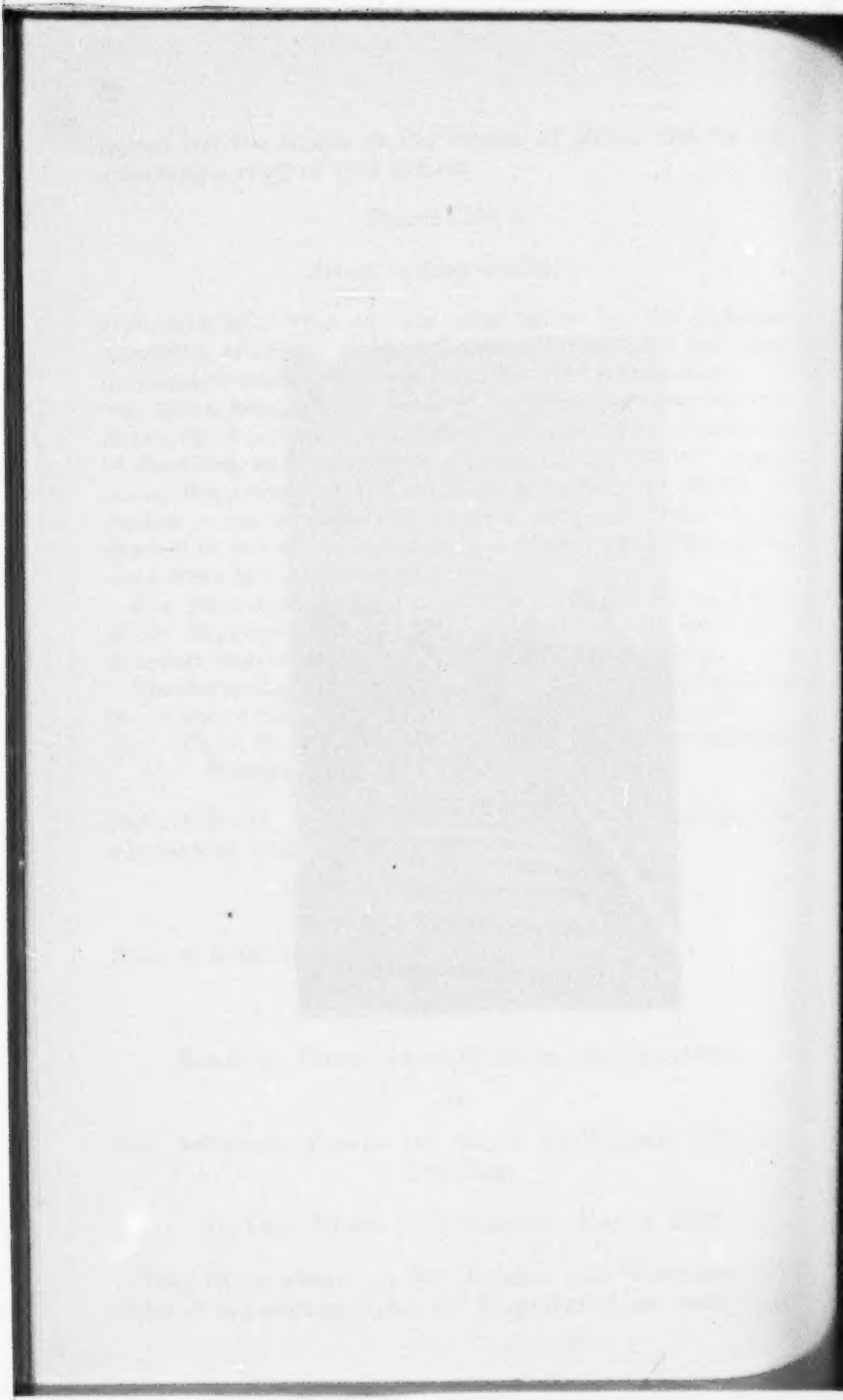
MABEL G. TOOPS, Administratrix, etc., Appellee,

vs.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, Appellant

JOURNAL ENTRY OF JUDGMENT—May 4, 1929

This cause comes on for decision and thereupon it is ordered and adjudged that the judgment of the court below



be affirmed. It is further ordered that the appellant pay the costs of this case in this court taxed at $— and hereon let execution issue.

[fol. 95] IN SUPREME COURT OF KANSAS

No. 28,499

MABEL G. TOOPS, as Administratrix of the Estate of M. G. Toops, Deceased, Appellee,

v.

THE ATCHISON, TOPEKA & SANTA FE RAILWAY COMPANY, Appellant

Syllabus by the Court

1. Master and Servant—Federal Employers' Liability Act—Evidence—Sufficiency to go to Jury. In an action under the federal employers' liability act by a widow, as administratrix, to recover for the death of her husband, the evidence considered and held sufficient to require submission to the jury.
2. Same—Sufficiency of Evidence to Support Judgment. And further, the evidence held to have been sufficient to uphold the jury's findings of negligence on the part of defendant and to support the verdict and judgment.
3. Appeal and Error—Review—Necessity for Presentation to Trial Court. Alleged errors not brought to the attention of the trial court cannot form a basis for review in an appellate court.
4. Master and Servant—Instructions. Complaint of instructions and that plaintiff was not properly appointed administratrix, considered and not sustained.

Appeal from Reno District Court, William G. Fairchild, Judge

Opinion Filed May 4, 1929. Affirmed

William R. Smith, Owen J. Wood, Alfred A. Scott, Alfred G. Armstrong, all of Topeka, and William Osmond, of Great Bend, for the appellant.

Carr W. Taylor and James N. Farley, of Hutchinson, for the appellee.

OPINION—Filed May 4, 1929

The opinion of the court was delivered by

HOPKINS, J.:

The action was one under the federal employers' liability act by a widow, as administratrix, to recover for the death of her husband. Plaintiff prevailed, and defendant appeals.

The facts were substantially these: M. G. Toops had been in the employ of the defendant railway company since 1913. For several years prior to August 12, 1926, he had been in passenger service running out of Kansas City. The middle of August of that year he was transferred to Dodge City as freight conductor from Dodge City to Elkhart. (He had not run on this line for some thirteen years.) On August 12, 1926, with a crew consisting of himself as conductor; Nolan, head brakeman; Hemphill, rear brakeman; Hall, engineer, and Phillips, fireman, he ran from Dodge City to Elkhart. They passed through Rolla in the after- [fol. 96] noon, but did not stop. They started on the return trip from Elkhart about eleven o'clock the night of August 12, picked up four empty cars at Wilburton, and arrived at Rolla between 12:30 and 12:45 the morning of August 13. The train consisted of about thirty cars.

The main line of the defendant railway company through Rolla runs approximately east and west. There was a passing track north of the main-line track, 1,600 or 1,700 feet in lenth, and another passing track, 800 feet in length, south of the main-line track and south of the depot, which was also south of the main-line track. South of the last-mentioned passing track was a third track which ran to two elevators, which were south and west of the depot. For convenience we will denominate this the elevator track. Crossing all the tracks west of the depot and passing between the elevators was a public road.

Upon arrival at Rolla the train stopped, with the engine just west of the depot. Hemphill and Toops, who were riding in the caboose, got out and walked toward the front

of the train, one on either side. They had orders to pick up five loaded grain cars which were at the elevators on the elevator track and to take fifteen empty grain cars from the north passing track and spot them at the elevators on the elevator track. Nolan, who had been riding the front of the train, took the engine with the four empty cars picked up at Wilburton, went east on the main line, backed on to the elevator track and picked up the five loaded grain cars. Hemphill went across to the elevator track and assisted Nolan in connecting up the loaded grain cars. Having done so, they went on east, got on the main line track and then backed west to a coupling with the train, Toops making the connection with the air hose. Nolan, Hemphill and Toops met on the station platform and went over the switch list together.

The grain cars on the north passing track were in two sections, four or five of them west of the public road crossing. East of the grain cars on the passing track were twelve stock cars. There was a cross-over switch from this north passing track to the main line about 900 feet east of the depot. The stock cars were foul of the cross-over switch, and in order for the engine to get on the north passing track to connect up with the empty grain cars it was necessary for it to go to the east end of the passing track, back into the stock cars, push them back and couple [fol. 97] onto the grain cars. Nolan went east with the engine, backed in on the north passing track and coupled into the east end of the stock cars.

Hemphill left Toops, went from the main line north to the passing track and coupled up the stock cars with the grain cars. Toops remained on the station platform, going through his switch list. After coupling with the grain and stock cars they all (except Toops) proceeded east on the north passing track out on the main line. Nolan last saw Toops alive on the platform at the time the grain cars were pulled out on to the main line. Hemphill last saw him alive on the east end of the platform with his lantern on a truck and his train book in his hand, looking through his switch list. He was run over and killed at a derail on the elevator track about 300 feet east of the depot by the grain cars which were "kicked in" on such track by the train crew. There was a rather sharp curve in the ele-

vator track where it left the main line. It went through a cut, the bank of which on the south side was close to the elevator track and eight or ten feet high. A person on the elevator track at the derail mentioned could not be seen by the engine or train crew at the point where the "kick in" was made.

The principal question for our consideration is whether under all the facts and circumstances there was sufficient evidence to take the case to the jury and to sustain the jury's finding that the defendant was negligent in the manner in which it "kicked in" the cars.

The jury answered special questions as follows:

"1. Was M. G. Toops, the deceased, in charge of the train and switching operations at and before the time he was killed?

"A. Yes.

"2a. Was M. G. Toops killed by coming into contact with the fifteen grain cars that were being placed on the elevator track?

"2b. If you answer the preceding question 'yes,' state which car, if any, struck Toops.

"A. The first car on west end of the fifteen grain cars.

"3. Were there any marks of blood on the rear car of the fifteen grain cars?

"A. There was no direct evidence to show there was or was not.

"4. Were there marks of blood on the south wheels of all the other grain cars except the rear car?

"A. Yes.

"5. Did Toops know of the coming on the elevator track of the fifteen grain cars?

"A. He knew they were to come.

"6. Was Conductor Toops supplied with a good lantern?

"A. He had a good lantern.

"7. If you answer Q. No. 6 in the affirmative, then state if he could have by the aid of said lantern seen the approaching cars.

"A. No.

"8. Had not Toops formerly worked on the Elkhart branch from Dodge City to Elkhart?

"A. Yes.

[fol. 98] "9. Had the yards at Rolla, Kan., been materially changed since he worked on said line?

"A. We don't know.

"10. State fully in what the negligence of the defendant consisted, if any.

"A. First, in not protecting rear end of fifteen grain cars. Second, in engineer not sounding signal when starting to back cars around curve and through cut. Third, poor condition of the track at the derail switch."

The defendant contends that the plaintiff failed to show many essential facts necessary to entitle her to go to the jury on the issues. To determine the correctness of this contention requires a careful review of what evidence had been adduced. The facts narrated above are not in dispute and need not be repeated.

A book of rules prepared by the defendant and issued to trainmen for their government in handling of trains was introduced in evidence. Some of these rules are pertinent here. And it is perfectly clear they were not followed.

"Station.—A place designated on the time-table by name, at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated.

"Yard.—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time-table, or by train order, may be made, subject to prescribed signals and regulations."

Under the evidence Rolla is a "station."

"Sec. 102. When cars are pushed by an engine (except when shifting in making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need.

"Sec. 320. Trainmen and yardmen, before switching or moving cars at stations, must ascertain that there are no persons or property on or about the same that might be injured or damaged by so doing.

"Rule 381. Conductors of freight trains are required to do their work thoroughly at stations, bearing in mind that

trains are run to do the business of the road and not merely to make time over it. Trains, however, are expected to run with regularity and as nearly on time as the prompt performance of work and rules will permit.

"Rule 396. They must do such switching as shall be necessary in taking cars for their own trains or in leaving cars from the same. Local freight trains are generally to do necessary switching at stations, but any freight train may, in case of necessity be called upon by station agents to do such work, and the same will be performed. Conductors when at stations doing work will attend personally to the switching unless engaged in checking the unloading way freight as provided in rule 389, when they may allow brakeman, if competent, to do the switching.

"Rule 483. They will take into consideration that the lives of passengers and trainmen as well as the property of the [fol. 99] company, are intrusted to their care, and it is fully expected and required that they will not only attend to all signals and instructions, but also that they will, on all occasions, be vigilant and cautions themselves, not trusting alone to signals or rules for safety. Whenever it becomes necessary to protect rear of train, enginemen will promptly signal flagman as per rule 14 (c).

"Sec. 473. They will, in rounding all curves where the view is obscured, sound the whistle, using the signal prescribed in rule 14. (Rule 14 provides for two distinct whistles.)

"Sec. 478. They will use great care in backing up to take a train or backing into a siding to take or leave cars, and will approach so slowly that couplings can be made without injury to persons or property.

"Sec. 24. When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

Under the rules it was the duty of Conductor Toops to assist in the switching operations; it was his duty personally to see that the cars were spotted at the respective elevators as called for by the switch list which he was examining when last seen by Nolan and Hemphill; to see that

there were no obstructions on the track; that the road crossing west of the depot was left open; that the brakes were properly set to hold the cars at each one of the elevators. The performance of these duties required him to be on the south side of the elevator track, the elevators being on that side, and also the engineer's side of the train. There was a path on the south side of the main line eastward from the depot. It is the theory of the plaintiff that Conductor Toops followed that path to a point north of the derail and then started south to cross over the elevator track.

The elevator track at the derail was skeletonized. A witness stated there was possibly a "gallon" of dirt between the ties. Thistles and weeds had grown up between the ties and obscured the actual condition of the track. The route suggested by the plaintiff is the nearest and most practical one from the depot platform where Toops was last seen to where his body was found. No eyewitness saw him meet his death. His body was found between the rails of the elevator track at the derail. His shoulders were upon, and jammed against, the derail, his body lying diagonally across the track between the rails, with his feet to the north and east toward the north rail. His head and right arm were mached off, and with his hat were lying south of the south rail of the elevator track near the derail. His lantern and lead pencil were lying near together, south of the elevator track about two or three feet away from the [fol. 100] south rail of the track, his lead pencil lying between his lantern and the south rail. His train book was found lying in the center of the track between the rails. The surface of the track between the rails showed clearly that the body was dragged westward two or three feet until his shoulders were jammed against the derail. Three or four cars passed over his body and were standing west of the derail where they stopped from lack of momentum.

As before noted, the train crew, except Toops, had gone east on the main line with the train. The night was so dark that during the switching operations the men could not be seen any considerable distance. Their respective positions were discernible only by the light from their lanterns. Neither the engineman nor brakemen, from their positions, could be seen around the curve on the elevator track on account of the cut and the bank above mentioned. Hemphill gave the kick-in signal to Nolan and the engineman.

An attempt at a kick-in was made but was not successful because the condition of the road was such that Nolan was unable to get on the train and cut the grain cars from the stock cars. Nolan testified:

"I was slow about getting on and I missed the pin. I was slow on account of the condition of the track. There were weeds there and the tracks were skeletonized and bad footing along there."

Here it is contended that the crew was derelict in its duty. Nolan gave a second kick-in signal. The cut was successfully made. Instead of one of the brakemen riding the kicked-in grain cars, according to the rules, both remained with the engine and the stock cars. The kick-in sent the fifteen grain cars west down the mainline track and on to the elevator track with no one on them to control them or stop them in case of danger. No light was on the front end of the moving cars; no kick-in or push signal was given by the engineer by blowing the whistle nor was the bell rung as a warning to any person who might be on the elevator track or anyone who might be crossing the tracks. Each of these omissions was a flagrant breach of the rules devised by defendant itself for the protection of its train crews.

It is argued that the deceased was in charge of the train crew; that he planned out the switching operations, which were carried forward under his orders; that he told Hemphill he would watch out for the grain cars, and therefore it is not reasonable to suppose that he would expect a kick-in signal or that one of the trainmen would ride in the kick-in cars, or place a lantern at the rear car to indicate the cars [fol. 101] were coming; that since the stock cars were to be returned to the north passing track after the grain cars were kicked-in, Toops knew that neither brakeman would ride the grain cars. The contention is not sound. In the first place, there is nothing in the record to indicate by reasonable inference or otherwise that the deceased expected the crew to do its work other than in accordance with the company's rules. Second, there is nothing upon which to base the assumption that the deceased had any reason to believe that one of the brakemen would not ride the kicked-in grain cars. Nor is there any evidence to show

that Toops knew the stock cars were foul of the cross-over switch. It was too dark for him to see them or note their position. Had they been east of the cross-over switch the engine would have backed in and coupled with the grain cars. Testimony by Hemphill concerning the conversation follows:

"The last time I saw Mr. Toops before his death, he was standing at the east end of the platform station on the platform. I did not at that time have any talk with him. Before that I had talked with him. He was coupling up the air hose on these four or five cars that we picked up that were coupled on to the train; he was coupling the air hose up on them, and I walked down the south side of the passing track to this crossing to make that joint, and while Mr. McHenry was bringing the engine through the stock track I was standing at the crossing on the north side of the main line talking to Mr. Toops; he was on the south side of the main line, and he asked me if these fifteen cars were all in one cut and I told him they were, and that I would kick them all into the elevator track. He said, 'All right, I will look out for them.'"

The fact that Toops knew the cars were coming does not, in our opinion, relieve the defendant of liability for the negligent manner in which the cars were sent in on to the elevator track. He did not know that they would be kicked in without a signal from the engineer; he did not know that they would come silently down upon him without a white light on the leading car; he did not know that they would come down upon him without a brakeman in control thereof and in a position on the end of the car where he could see persons upon the track and protect them from the danger. It must be assumed that Toops was familiar with the rules and likewise had a right to believe that his brakemen and enginemen were familiar with them; he had a right to believe that the rules would be observed by each one of his trainmen; it was but natural for him to make the attempt to cross over the track because no warning of any kind had [fol. 102] been given that the cars were approaching. He had a right to rely upon the requirements of rule 473 (supra) which provided that in rounding all curves where the view is obscured, a whistle shall be sounded twice, noti-

fying him that the cars had been kicked-in on the elevator track. Engineer Hall testified:

"It is usual for the engineer to give a signal when he is starting up a train on a kick signal."

The deceased was not familiar with the elevator track; he approached it in the dark from the north for the first time in thirteen years. He is presumed to have been exercising due care and it may therefore be assumed that when he arrived at the track and attempted to cross it he listened for signals and heard none; that he looked for approaching cars with a light and saw none and that he stepped upon the defective track for the purpose of crossing over and instantly became aware that the kicked-in cars were upon him, but on account of the defective condition of the track it was impossible for him to escape; that in making an effort to escape he was knocked down, and as he fell forward his hat, lantern and pencil were propelled to the south side of the track. On account of the curve in the track his lighted lantern (which was thrown or fell out of his hand while falling) could not be seen by the crew. The position of the body indicates that he was knocked down by the west end of the moving grain cars. His train book containing 34 or 35 bills dropped into the center of the track between the rails and was lying two or three feet east of his body.

McMullen v. Railway Co., 107 Kan. 274, 191 Pac. 306, was in many respects similar to the instant case. McMullen was a brakeman for the Santa Fe, and was working at the yards at Emporia, helping make up a freight train. It was his duty, when the train was made up, to go to the rear end of the train and close the stop cock and couple up the air hose. The evidence showed that it was customary for trainmen in making up trains in yards to have recourse to the method of kicking-in cars. McMullen knew of these things. He was found dead. No one saw the accident. The jury found the train crew guilty of negligence. A verdict was rendered for plaintiff and affirmed by this court. It was a no-eyewitness case. Conductor Toops is presumed to have been exercising reasonable care. There is no evidence to the contrary. He is presumed to have been acting in the line of his duty which required him at some time or [fol. 103] other to be in the position where he was found.

In the McMullen case (supra) it was said in the opinion (pp. 280, 281):

"Counsel for the defendant in their brief say:

" 'There was no eyewitness to the accident nor was there any testimony as to how it occurred. It may be assumed, however, that very shortly after the conductor and brakeman left the way car, he left the car and closed the angle cock and at that time the cars were kicked in on track 4, and by the impact, while he was between the rails on track 4, and at the rear end of the way car, was knocked down and run over. This assumption is based entirely on the situation appearing after the accident. * * * The duty of the conductor and brakeman of the train crew was to examine the seals and check the cars in the train, and that of McMullen was to close the angle coach, hang up the tail hose, and couple up the air hose in the train. This was usually done after the train was made up and just before or after the road engine was attached to the train. Although from what he told Doctor Eckdall, it was not the proper time to do so, he thought it had to be done and he would perform that duty while the train was being made up.'

"From all this testimony and the rules of the company referred to, and the condition of affairs assumed by counsel for defendant, it seems unreasonable to hold that McMullen was not engaged in the performance of his duty when injured, or that he was not located and engaged as the switch crew knew he or some other brakeman ought to be.

"While it may not have been the duty of the switch crew to keep a lookout under ordinary circumstances for a member of the train crew attending to the air couplings, the violent collision caused by the wrong signal and its effects were such as to make it a question for the jury whether such operation was negligent or not. (Saar v. Railway Co., 97 Kan. 441, 155 Pac. 954.)

"But it is urged that the negligence on which the jury based the verdict was other than that alleged in the petition. We hold, however, the charge that the switch engine and cars were shoved at a dangerous rate of speed and run with great force and violence without warning against the other cars of the train, causing the way car suddenly and violently to move backwards over the body of McMullen, fairly includes the cause of such alleged violence,

which was the transmission of the wrong signal. (Linker v. Railroad Co., 82 Kan. 580, 109 Pac. 678.)

"It is also urged that the deceased assumed the risk, thereby exonerating the defendant. In Spinden v. Railway Co., 95 Kan. 474, 148 Pac. 747, we held that in an action under the federal employer's liability act it was error to instruct that the assumption of risk could only be established by showing that its danger was so glaring that a person of ordinary prudence would not have attempted it. In the opinion it was said:

" 'The employee is not regarded as assuming unknown or unappreciated risks arising from his employer's neglect, unless they are so obvious that an ordinarily prudent person would observe and appreciate them.' (p. 476.)

"The federal supreme court in Seaboard Air Line v. Horton, 233 U. S. 492, held that congress in enacting this legislation based the action upon negligence only, and excluded responsibility of the carrier to its employees for defects not attributable to negligence. Touching risks not naturally incident to the occupation it was said:

[fol. 104] " 'These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them.' (p. 504.)"

(See, also, Reese v. Phila. & Reading Ry., 239 U. S. 463; Ches. & Ohio Ry. v. De Atley, 241 U. S. 310; Ches. & Ohio Ry. v. Proffit, 421 U. S. 462; Chicago, R. I. & P. Ry. Co. v. Ward, 252 U. S. 18.)

It is contended that the deceased "assumed the risk involved in the operation." We believe that the condition of the track and the manner in which the train crew kicked-in the fifteen cars were not risks which Toops assumed. There was no evidence that he knew it was a custom of this train crew or of any train crew to kick-in cars at stations in the manner in which these were kicked-in. There was some testimony that it was the custom to kick-in cars in making up trains, but we believe the inference can fairly be drawn that that had reference to the making up of trains in yards and not to switching operations at way stations.

As before noted, the evidence was that Rolla was not a yard. The defendant's rules specify that when cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the leading car at night (rule 24) or a flagman must be on the front of the leading car by day. (Rule 102.)

In 39 C. J. 692 it is said:

"Risks which arise from the negligence of the master or those representing him are not 'ordinary risks' incident to the employment, but are 'extraordinary risks.' Hence, under the general rule as to extraordinary risks, but subject to the limitations hereinafter considered, risks which result from the negligence of the master, that is to say, those risks which are avoidable by reasonable care on his part, are not assumed by the servant. The master, in the proper performance of his duties as such, is bound to exercise care and prudence to prevent his employees from being subjected to unreasonable risks or dangers, and to agree by implication of law not to subject a servant employed by him to extraordinary or unusual perils, and the servant has the right to assume that the master will perform his duty in this respect, except to the extent that the rule may be modified as to risks that are so open and obvious that a man of ordinary prudence would see and appreciate them; and it is very generally declared that the risk assumed commences only after the master has exercised due care in the performance of the duties which the law casts upon him." (See, also, 18 R. C. L. 676, 677.)

The defendant cites and relies on Salisbury v. Atchison T. & S. F. Rly. Co., 125 Kan. 131, 263 Pac. 791. The facts in that case are entirely different from those in the instant case. The plaintiff there testified:

[fol. 105] " 'I was struck in the back by the train. I don't know what part of the train struck me * * * Something that stood out past the cars hit me. I do not know what it was. The train kept going on after it hit me. I didn't know what it was that hit me. I did not see a thing that struck me' " (p 133.)

In the Salisbury case the court quoted from Douglas v. Mitchell's Ex'rs, 35 Pa. 443, as follows:

"'As proof of a fact the law permits inferences from other facts, but does not allow presumptions of fact from presumptions. A fact being established, other facts may be, and often are, ascertained by just inferences. Not so with a mere presumption of fact. No presumption can with safety be drawn from a presumption; there being no fixed or ascertained fact from which an inference of fact might be drawn, none is drawn.'" (p. 135.)

Here several physical facts established by the evidence clearly show how Conductor Toops met his death. It is proper, therefore, to draw inferences from those physical facts. The fact that the track was skeletonized and dangerous, especially in the nighttime unless great care was used by the person crossing over it to avoid falling; the fact that the lantern was lying in the weeds three or four feet south of the track and the conductor's lead pencil was between it and the south rail; the fact that his head, arm and hat were on the south side of the track; the fact that his train book with thirty-four or thirty-five bills in it was lying in the center of the track about three feet away from his body; the fact that his body had been dragged down the center of the track two or three feet until the shoulders were jammed against the derail, are all physical facts from which proper inferences may be drawn as to how the death occurred.

In the Salisbury case, supra, it was observed that—

"With the presumption that the injured employee used due care goes the correlative presumption that the employer used due care. This presumption must be overcome by evidence. When circumstantial evidence is relied on to prove a fact, the circumstances must be proved. The circumstances must not themselves be presumed, and one presumption cannot be built upon another." (p. 134.)

The presumption that the defendant employer in the instant case used due care was overcome by the evidence.

It is argued that there was no evidence to support the claim that the deceased was struck by the west end of the fifteen moving grain cars, but that he must have attempted

to climb to the top of the train and somehow or other have fallen between the first and second moving cars. The argument is not reasonable. The physical facts from which a reasonable inference must follow indicate that the deceased was struck by the west end of the cars. For instance, the position in which his lan- [fol. 106] tern, hat and pencil were found. He was right-handed. Inasmuch as he had come south to cross the track it is natural to conclude that when he was struck his pencil and lantern were thrown out and away from the track. His train book, with the bills in it, was found in the center of the track between the rails and east of his body, indicating that he was carrying the train book in his left hand at the time he was struck, and dropped it in the center of the track. Had he attempted to climb on the train and fallen off, the train book would undoubtedly have been found in his pocket. His body wsa dragged between the rails for a distance of two or three feet. It is argued with much emphasis that the deceased could not have been struck by the first car because there was no blood on the wheels of that car. The contention does not appeal to us for several reasons. First, there was testimony by a physician showing that "in a crushing injury where a railroad car wheel or engine mashes off a member it mashes up the issue so badly, including the blood vessels, that there is no bleeding immediately following, like there would be if it was cut off with a sharp instrument." Second, the position in which the body was lying, with shoulders on the derail, breast up, legs and feet extending north across the track and a little to the east, the head and right arm having been mashed off and the arm found west of the head; the scraping of the dirt and gravel in the roadway, showing that the body had been dragged, considered altogether, give evidence of the fact that the deceased was struck, knocked down and dragged or rolled by the first car, but that the wheels of the second car were the first to actually run over the body. On the other hand, if he had attempted to climb on the moving train and had fallen, he would naturally have fallen outside the rails. His body would not have been inside the rails and lying across the roadbed.

The defendant argues that it was not the custom and practice to have a brakeman at the rear end of the cars

which the crew were moving in switching operations, but it says that "the protection of the public is a very different proposition, and with regard to the public the rule probably is that in switching at night there should be a brakeman or flagman on the rear car with a light; but in this case the cars were not approaching a public crossing nor any like place." The last statement disregards the fact [fol. 107] that there was a public road crossing over all of the tracks just west of the depot and running between the elevators where the grain cars were to be spotted.

A number of cases are cited by the defendant in support of the theory that the giving of signals by the ringing of a bell or blowing of a whistle would cause confusion and is therefor- not required. The difficulty with defendant's contention in this regard is that this accident happened at a station and not within a "railroad yard." The defendant's argument is entirely correct so far as it applies to railroad yards. In the instant case the very signals, the lack of which is claimed as negligence, might, if given, have prevented the tragedy. The ringing of the engine bell or whistling from the engine could not have been confusing because there was no other engine moving at the station. A proper whistle would have apprised the deceased that the cars were "kicked" back.

The main contention of the defendant is that there was no prima facie case for a jury, a contention we cannot sustain. This is not one of those cases where we can say as a cold-blooded matter of law that there was no negligence and no liability. The physical facts, the evidence and the fair and reasonable inferences to be drawn therefrom were, in our opinion, sufficient to justify the conclusion reached.

The defendant contends that the verdict ($22,750) was excessive, a contention with which we might be inclined to agree but for the fact that the defendant appears to be in no position at this time to raise the question. No complain of the amount of the verdict was made by the defendant in its motion for new trial nor in its specifications of error. Under the oft-repeated rule that alleged errors not presented to the trial court cannot be considered here, we are unable to go into this phase of the controversy.

Complaint of the instructions and that the plaintiff was not properly appointed administratrix by the probate court

of Douglas county have been considered but cannot be sustained. Nor is it necessary to add discussion of those questions to an already lengthy opinion.

The judgment is affirmed.

Marshall and Hutchison, JJ., dissenting.

IN SUPREME COURT OF KANSAS

DISSENTING OPINION

BURCH, J. (dissenting:

The action was based on the federal employers' liability act. The case is governed by federal law. The judgment [fol. 108] must stand up, if at all, under the decisions and the method of review of the supreme court of the United States. The opinion of this court makes no reference to decisions of the federal supreme court touching any phase of the case except the subject of assumption of risk, which I do not regard as important. If I read the federal decisions correctly, the judgment of the district court should be reversed.

The jury found defendant was negligent in not protecting the rear end of the fifteen grain cars. The opinion of the court approves the finding because neither brakeman nor white light was on the west end of the grain cars, and conductor Toops had a right under the rules to believe and rely on the fact that one of his brakemen would ride the kicked-in grain cars, the brakeman taking a position on the west end of the first car, where his light could be distinctly seen. The rules supposedly creating this duty were rules 24 and 102.

Conductor Toops knew perfectly well that no brakeman with a light would be on the end grain car to show him the string of grain cars was coming, because he planned the work so his brakemen would of necessity be otherwise employed, and in planning the work he was the company.

The first work done was to get five loaded grain cars from the elevator track and put them into the train. Toops made the air coupling. The train was then made up, but there was switching to do. Toops and his two brakemen went over the switch list. The instructions were to get

fifteen empty grain cars, which were behind twelve stock cars, off the passing track, and place the grain cars at the elevators for loading. The head brakeman went east with the engine to open and close switches and make the engine couplings. The rear brakeman stayed behind to make the coupling of cars back at the road crossing. This done, engine, stock cars and grain cars all went eastward, and both brakemen went with them. The grain cars were to be kicked in on the elevator track, the stock cars were to be replaced on the passing track, and the engine was them to be attached to the east end of the string of grain cars in order to push them to the elevators. The head brakeman's duties did not contemplate that he should leave the engine standing idle, get on the rear grain car, ride it back to show Toops the string of grain cars was coming, and then walk back, to throw the switches so the stock cars could be replaced, and after that the engine could be attached to the grain cars. The rear brakeman was obliged to take care of the stock cars after they were kicked back on the pass- [fol. 109] ing track, and he could not get on the rear grain car and ride it back to show Toops the string of grain cars was coming, without holding up the work. Toops had but two brakemen. The train was to be put over the road that night, and it would have been the essence of nonsense for Toops to take either brakeman from his proper employment and assign to him the duty of riding the rear car of the string of grain cars, lantern in hand, back to where Toops was waiting for them, just to show Toops they were coming. That practical application of the rules required no such absurdity was disclosed by the following testimony for plaintiff:

"And while Mr. McHenry was bringing the engine through the stock track, I was standing at the crossing on the north side of the main line, talking to Mr. Toops; he was on the south side of the main line, and he asked me if these fifteen cars were all in one cut, and I told him they were, and that I would kick them into the elevator track. He said, 'All right, I will look out for them.' "

Toops knew perfectly well that neither of his brakemen carried two lanterns, one to work with and the other to be put on the rear end of the string of cars to show Toops they

were coming. Of course there was no need of a light to protect the public crossing west of the station, because Toops was on guard looking out for the cars some 300 feet east of the station.

It was not Toops' duty merely to assist in the switching operations. Rule 396 required him to attend personally to the switching, since he had no unloaded way freight to check. He was in full charge of the switching operations, not theoretically, as a matter of rule, but as a matter of fact. One of plaintiff's witnesses testified:

"If he tells me to do something as a brakeman, it is my duty to do it; and if he tells Hemphill to do something, it is Hemphill's duty to do that; and if he tells the engineer to do something, it is the engineer's duty to do it. The conductor has entire charge of the switching operations, and the others simply work under him."

The result is, protection of the rear end of the fifteen grain cars goes out of the case as a basis of recovery, because the company was not negligent toward Toops in that regard.

The second ground of negligence found by the jury was failure of the engineer to give a signal when starting to back the cars. What was the purpose of such a signal? Manifestly, the purpose was to apprise a person who might not anticipate a backward movement of the train that such a movement was about to begin, and would result in sending cars in on the elevator track.

At the time the signal should have been given the end of [fol. 110] the string of grain cars was east of the junction of the elevator track with the main track, the stock cars were east of the grain cars, and the engine was at the east end of the string of stock cars. The curve and the embankment intervened between the end car of the string of grain cars and the place Toops chose to meet it. A sounded signal would be far away. Time would elapse before the end car would reach Toops and, signal or no signal, he would necessarily be obliged to be on the lookout for approach of the expected cars. So rule 483 applied to Toops. That rule required him to be vigilant and cautious, and not trust alone to signal or rule of safety. He had sent the engine and brakeman eastward for the express purpose of kicking

the grain cars upon the elevator track. They were certain to arrive after sufficient time to complete the preliminary operations and then perform the kicking operation. There was in fact delay. The engineer gave the cars a kick, and stopped. The slack ran out, and it was discovered the grain cars were not detached. New signals were given, a second kick was made, and the grain cars were cut off. In anticipation of their approach, Toops went to a proper place to meet them. When the end car approached him it was moving slowly, because inertia very soon brought it to rest, and the presumption is Toops was vigilant and cautious, and watched carefully for approach of the very cars he went to the switch track to meet.

The jury found that Toops had a good lantern, but the jury found he could not see the cars with it (finding No. 7). The two brakemen had no difficulty in finding cars and switch stands and safely making couplings with their lanterns, one of which was like the one Toops carried. Toops said he would look out for the grain cars. As indicated, he knew there would be no brakeman with a lantern and no white light to show him the end car of the fifteen grain cars. Signal or no signal, he had to find the grain cars with his lantern. He knew and the jury knew he was equipped to do so, and the seventh finding of the jury would be ludicrous if the subject to which it relates were not so serious. The court's opinion properly indulges the presumption that when Toops arrived at the switch track he looked for the approaching grain cars, but the court's hypothesis that he did not see the end of the grain car which immediately struck him is quite as unsupported by evidence as the jury's finding.

Under federal law the employer must not only be negligent, but the proof must show that the negligence caused the [fol. 111] injury. (St. L. & Iron Mtn. Ry. v. McWhirter, 229 U. S. 265, 281; C. M. & St. P. Ry. v. Coogan, 271 U. S. 472, 478.) In this instance there is no evidence that failure of the engineer to give a signal before he kicked the grain cars upon the elevator track had anything to do with the accident.

The third element of defendant's negligence found by the jury was the poor condition of the track. A photograph of the track taken the day after the accident is in the record.

The question fairly arises whether the jury was competent to declare defendant negligent in providing the kind of track disclosed by the photograph and the testimony, and whether Toops did not assume the risk of using skeletonized elevator tracks at small stations on the Dodge City-Elkhart branch line; but waiving this matter, there was no evidence the condition of the track had anything to do with Toops' death.

Nolan said he was slow about making the cut for the first kick because of the condition of the track—bad footing. The conclusion that Toops was killed because of bad track is on a par with the reasoning of a witness for plaintiff. The witness opined the accident might have been caused, not by lack of ballast, nor by weeds, nor by skeletonized track, but because of a spike not fully driven down. The witness testified:

"He could have caught his foot on a spike. There is a spike sticking in there just close to where he laid on the inside of the rail. * * * I didn't see anything to indicate that he fell on a spike, but he was there, and the spike was there."

All the proof there is in the record that the condition of the track caused the accident is that the track was bad and the man was found dead upon it. To conclude the condition of the track caused the accident involves a spurious use of the *res ipsa loquitur* doctrine instead of speculation, in determining cause, a method specifically condemned by the supreme court of the United States in an opinion published April 15, 1929. (Louisville & Nashville Railroad Co. v. Chatters, Advance Opinion No. 414, p. 8.)

The court's explanation of the accident is as speculative as it is schematic. It is assumed without evidence that Toops did not reach the place of the accident until just as the rear grain car arrived. Under this assumption Toops would have run into the side of the string of grain cars but for the failure of the first kick of the engine to send them in on the elevator track. To the first assumption is [fol. 112] added another, having no basis in the evidence, namely, that Toops stepped on the track in front of the moving end car, which he looked for and could not see, on his watchful way to the south side of the elevator track. Then

follow assumption after assumption, until the fanciful account of the accident is complete. The end of the first car struck Toops; his agility was handicapped by the skeletonized track, his feet were trapped, and he was knocked down; he threw his lantern and pencil to a place beside the track, with his right hand; he dropped his train book, which he held in his left hand, between the rails; then with his hands free, he was helpless, and suffered fatal mutilation. Attorneys for plaintiff go so far as to give us the workings of his mind while facing his doom. They say he threw his lantern to the side of the track for an emergency signal, which nobody could see, and the court does not relinquish the view that Toops actually threw his lantern into the weeds beside the track.

It will be recalled that Toops' hat was found beside the track with the lantern and pencil. Did he throw his hat there as he did the lantern and pencil? If so, with which hand? Or did the hat fall there, and if it did, why may not the lantern and pencil have fallen there?

The lantern was from three to four feet south of the south rail of the track. The hat was nearer the rail, and the pencil still nearer. Conceive of a yardstick poked under the overhang of a large-size grain car, with one end against the rail. The other end of it would be in the midst of the articles mentioned, and it is just as reasonable to assume that the articles fell at the side of the car as that they were thrown from a place on the track at the end of the car by a man suddenly knocked down.

The court says that if Toops had been on the car and had fallen down, his train book would have been in his pocket. One easy guess is that maybe the train book was in a pocket when the terrible encounter commenced which ended with the headless body jammed against the derail.

The court says that if Toops had attempted to climb on the moving cars and had fallen, he would naturally have fallen outside the rails. I am not familiar with the law of nature which would prevent him from falling partly outside the rails and partly between the rails.

At some time Toops left the station platform, where he was last seen, and went to the switch track, where he was [fol. 113] killed. He was in the midst of unfamiliar surroundings. The night was very dark, and after traveling

about 100 yards, he was to approch the elevator track for the first time in thirteen years. Just why he should carry his pencil in his lantern hand, and his trainbook with thirty-four or thirty-five bills in it in his left hand, to meet a cut of kick-in cars which he was to take care of, has never been explained. Book and pencil in separate hands could not help him find the way, or find the cars on the switch track, or be of use to him when he reached the switch track, or be of use to him when he began to do what was necessary to take care of the cars. The articles might be a hindrance to him in doing his work, something which an experienced and prudent man would guard against. A common sense view would be that when he was ready to go he stuck his pencil under his hat the way conductors do, put his billbook in his pocket, took his lantern in the hand he used by force of habit, and proceeded to the place where he had planned to be. Any way, there would have been nothing fantastical about this kind of conduct, and if he did conduct himself in that manner, it requires no more invention to explain what followed than appears in the court's opinion.

To render the court's theory of the accident tenable, it is indispensable that Troops should have been struck by the west end of the west grain car, knocked down and then killed. The theory has been that he was killed practically as soon as he was knocked down. Some physical facts rationally considered refute the theory. Paintiff's witnesses testified there was no blood on any of the four south wheels of the west car, and that there was blood on the south wheels of all other grain cars. In plaintiff's brief it is said that, "blood was found on all of the cars except the first car on the west end of the string of fifteen cars."

The jury's evasive answer to the third interrogatory discloses the candor which it displayed in disposing of the case. A witness who examined the car wheels both the night of the accident and the next morning testified there was flesh as well as blood on the wheels, and nobody corrected or contradicted him. His testimony is important, and follows:

"We examined the trucks of the freight cars that night, and then made another examination the next morning. We found no marks of blood on the first car. The first marks of blood we found on them were on the west end, west wheel, on the south side of the second car. Following these

cars up to the engine, we found blood on every wheel, blood and flesh on every wheel up to the tender, up to and including the tender.

[fol. 114] "I crawled under the cars the next day, just under the first two. I made this examination at the request of Mr. Shull, the claim agent of the Santa Fe, and Doc Ellis. It was made in the morning. Doctor Ellis was the doctor that was called before we moved the body, before anybody would touch it. The doctor requested that we look the ground over thoroughly, because we would all be called, and that we would more than likely be called on the coroner's jury."

To prevent the jury from drawing from the physical facts the natural and inevitable inference that Toops was killed by the first wheel of the second grain car, plaintiff produced a physician who gave the following testimony:

"In a crushing injury where a railroad car wheel or railroad engine mashes off a member, it mashes up the tissues so bad, including the blood vessels, that there isn't any bleeding immediately following it, like there would be if it was cut off with a sharp instrument."

When Toops was killed the grain cars were moving so slowly they stopped within a short distance. The head brakeman testified as follows:

"To the best of my judgment, the west end of those fifteen cars was about three or four car lengths west of the derail."

This testimony must be true, because the evidence was uncontradicted that the east car of the string of grain cars stopped within two or three car lengths of the elevator track switch, and the sketch, drawn to scale, submitted as illustrative of the station grounds, indicates the string would not be long enough to reach five car lengths beyond the derail.

It is a matter of common knowledge that the head is supplied with blood by large arteries ascending on each side of the neck, that the blood is returned by large veins, and that arteries and veins have brances and ramifications supplying the various tissues. Toops' head was severed,

and his right arm was mangled and severed. To do this it was necessary that the car wheel pass through arterial and venous blood. The physician would make of a car wheel and a steel rail such deft instruments that crushed major arteries and veins in crushed tissues would be sealed up so that no blood could escape—immediately. The doctor's testmony did not cover the subject of crushed tissue adhering to the wheel that crushed it. We have then this operation: The first car wheel does its dexterous work. The car moves on five or six feet—whatever the distance between the wheels of the front truck. The second wheel of the front truck comes through clean because the blood [fol. 115] cannot start to flow. The car rolls slowly on some twenty-five feet—or whatever the distance between the trucks of a 40-foot grain car. The first wheel of the rear truck passes over the place of severance. Still no bleeding. The car moves on, and the last wheel of the car comes in contact with no blood. The car rolls on for the distance between the rear wheel of the front car and the front wheel of the second car. Then is the time for bleeding to commence and flesh to adhere, and they do so.

In cases of this character the supreme court of the United States examines the record, determines for itself what is substantial and what is unsubstantial testimony, and does not permit a jury question to be raised by unsubstantial testimony. (Gulf, etc., R. R. v. Wells, 275 U. S. 455.) I fear the supreme court of the United States would not regard the physician's testimony as making a substantial contribution to the solution of the case.

Since the theory that the first car killed Toops forces the facts, the court falls back on the second car. Toops comes down to the switch track, and fortuitously steps on the track just as the west end of the first car reaches the exact locality. The west end of the first car strikes him, and he makes distribution in space of lantern, pencil, hat and train book. He is knocked down, but all the first car does is to push him maybe two or three feet, possibly roll him some. The second car then comes along and kills him. Besides nullifying the court's approval of the doctor's testimony regarding postponed exudation of blood, this will be a great surprise to plaintiff's attorneys.

The petition alleged that Toops was struck by the kicked-in cars, was knocked to the ground between the rails at a point three or four feet [two or three feet] east of the derail, and his body dragged until his shoulders rested against the derail. The petition then stated:

"That his head and right arm had fallen in such manner that they lay across the south rail of the elevator track and were severed from his body by the wheels of the rear car of said kicked-in cars; * * *"

The brief for plaintiff contains the following, printed in italics: "The petition contains our theory of the case, and the evidence amply sustains our theory."

The brief does depart a little from the petition. The petition states that Toops was knocked down, that his body was dragged, but that his head and arm had "fallen" so they were severed. The brief says:

[fols. 116 & 117] "His head fell over the south rail, as did his arm. We are not clear as to whether the front wheels severed his head and arm, or whether it was the rear wheels of the first car."

There was evidence the body was dragged westward a little way, and that the severed arm lay about three feet west of the severed head. There is not even a scintilla of evidence that the first car did the dragging. Finding the court's conjecture respecting a vital matter at odds with the conjecture upon which plaintiff commenced, tried and won the case, I am content to close with the observation that the decisions of the supreme court of the United States forbidding a jury to speculate on cause of accident are so numerous citation of them is superfluous.

[fols. 118-141] Petition for Rehearing, covering 23 pages, filed May 23, 1929, omitted from this print. It was denied and nothing more by order July 5, 1929.

[fol. 142] IN SUPREME COURT OF KANSAS

[Title omitted]

ORDER DENYING REHEARING—July 5, 1929

Now comes on for decision the motion for a rehearing of this appeal; and thereupon it is ordered that said motion for a rehearing be denied.

[fol. 143] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 144] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 21, 1929

The petition herein for a writ of certiorari to the Supreme Court of the State of Kansas is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 34,434. Kansas Supreme Court. Term No. 303. The Atchison, Topeka and Santa Fe Railway Company, petitioner, vs. Mabel G. Toops, Administratrix of the estate of M. G. Toops, deceased. Petition for writ of certiorari and exhibit thereto. Filed August 6, 1929. File No. 34,434.

FILE COPY

AUG 6 1929
CHARLES ELMORE CROP

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 303

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

MABEL G. TOOPS, ADMINISTRATRIX OF THE ESTATE OF M. G. TOOPS, DECEASED.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS AND BRIEF IN SUPPORT THEREOF.

E. E. McINNIS,
Chicago, Illinois;
WILLIAM R. SMITH,
OWEN J. WOOD,
ALFRED A. SCOTT,
ALFRED G. ARMSTRONG,
All of Topeka, Kansas;
WILLIAM OSMOND,
Great Bend, Kansas,
Counsel for Petitioner.

(34,434)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 303

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

MABEL G. TOOPS, ADMINISTRATRIX OF THE ESTATE OF M. G. TOOPS, DECEASED, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF KANSAS.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, The Atchison, Topeka and Santa Fe Railway Company, respectfully represents to this Honorable Court that Mabel G. Toops, as administratrix of the estate of M. G. Toops, deceased, recovered a judgment against your petitioner for the sum of $22,-

750.00, as damages for the death of her husband, M. G. Toops, who was killed in the employ of your petitioner as a freight train conductor while engaged in interstate commerce. The action was brought and tried under the Federal Employers' Liability law in the District Court of Reno County, State of Kansas, and upon appeal to the Supreme Court of the State of Kansas the said judgment was affirmed on the 4th day of May, 1929. The opinion of the Supreme Court of Kansas is reported in 128 Kan. 189 (Advance Sheets, May, 1929), 277 Pac. 57. A motion for rehearing was duly filed by the petitioner and was overruled by the Supreme Court of Kansas on the 5th day of July, 1929. The overruling of the motion for rehearing was and is the final judgment of the Supreme Court of Kansas in said cause, and said Supreme Court of Kansas is the highest court of law and equity in said state in which a decision could be had in said case. This petition for a writ of certiorari is filed within three months of the rendition of said final judgment. Your petitioner presents herewith a certified copy of the entire record and proceedings in the Supreme Court of the State of Kansas, and the opinion of said court, including the dissenting opinion of three of the Justices of said Court.

The contention of your petitioner is, in substance, that there is no evidence in the record to show how M. G. Toops, the deceased, met his death, and no evidence to show that his death was caused by any negligence on the part of your petitioner or any of its agents or employees.

Briefly, the facts in the case as shown by the evidence were as follows:

M. G. Toops had been in the employ of the petitioner as a conductor, and as such worked on various parts of the Santa Fe System. He was killed at the station of Rolla, Kansas, in the line of his duty, on August 13, 1926, at about 1:00 a. m., while acting as conductor of a train running from Elkhart to Dodge City, both in the State of Kansas. Some years prior to the date of his death he had worked as a brakeman on said division and through the station of Rolla, but this was the first trip made by him over this line for a number of years.

Rolla is a small station on the Elkhart Branch of the Santa Fe. At such station there is a main line, a passing switch, a house track and an elevator track. On the south side of the elevator track there is a bank of dirt possibly six to eight feet high, but no cut through this hill. As conductor, Toops was in charge of a train running from Elkhart to Dodge City (R. 29). Shortly after midnight the train reached the station of Rolla and cars were being switched at such station at the time Toops met his death. The movements of the cars consisted in the placing of stock cars which were already at the station, cars from the train, and in rearranging the location of grain cars. In the early movements of the crew in placing and moving cars, Mr. Toops took a part, assisting in the switching of certain cars which were attached to the train on the main track. The last time Toops was seen by any of his coemployes, or by any other person, he was stand-

ing on the platform near the station, and just before that he had a conversation with one of the brakemen in which they talked about the moving of certain cars on the industry or elevator track; and at that time he told the brakeman to attend to the movement of these cars and said, "All right, I will look out for them" (R. 24, 25, 30, 35, 39). The night was a dark night. Conductor Toops was supplied with a good electric lantern, and the rear brakeman had a similar lantern, while the front brakeman had an oil lantern. A few hundred feet east of the platform where Toops was last seen is a switch running from the main line and two hundred feet or more east of the station building and platform. This track divided, one track running directly west called the house track and the elevator track running a little south of that. After placing various cars, the remainder of the crew were engaged in placing certain grain cars which they were to spot on the elevator track. These cars were run from their original position up onto the main-line track, and then pushed back on the track which divided into the house track and the elevator track. The engine was pushing these cars from the east to the west. There were fifteen of these cars. On the top of the train pushing these cars was the rear brakeman and the front brakeman, at the time Toops body was discovered, each supplied with a lantern. About 100 feet from where the track divided there was a derail switch. While moving past this derail switch the front brakeman from the top of the train discovered a lighted lantern lying by the side of the track on the south side, and he im-

mediately signaled to the engineer to stop the train, and this the engineer did as soon as possible. It was then that the body of Toops was found under the engine tender, lying across the track, his feet to the north and his head and right shoulder over the south rail, and he seemed to be lying upon his back. His head and arm were cut off. His lantern and hat lay two or three feet to the south of the rail. At the time that his body was discovered after stopping the train his shoulders lay against a derail switch which was about 100 feet from where the switch track left the main track (R. 26, 27). The ground between the ties was not filled to the surface, but there was some dirt between the ties. From the marks on this dirt it would seem that his body had moved a short distance from the place where he was originally struck. After discovering the body of Toops, the train crew and others who had come to the scene examined the trucks of the fourteen cars which the engine was pushing. No blood was found on the rear car by any of the witnesses who examined it that night. The same witnesses examined it the next morning also. At both times marks of blood were found on all the wheels of the first fourteen cars from the engine, and also on the wheels of the engine tender. Also there were discovered bits of flesh on the wheels of all except the rear car (R. 52). Along the track on this switch there were weeds growing, and, as said before, the space between the ties was not filled up. Between the rails Mr. Toops' pencil and waybills were found. The theory of the plaintiff, as set out in his petition, was

that Toops was walking up this track or alongside of the same from the station, and that he was struck by the rear car, knocked down and the rear car passed over him without doing any injury, and that then the next car cut off his arm and head. That the state of the track and the weeds had something to do with the injury.

The rules of the petitioner give the following definitions:

> "Station.—A place designated on time table by name at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated."
>
> "Yard.—A system of tracks within defined limits and provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time table or by train order may be made, subject to prescribed signals and regulations."
>
> Section 102 of the Rules reads: "When cars are pushed by an engine (except when shifting or making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need."
>
> Section 24 reads: "When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

Before moving the cars which ran over Toops, the engine gave no signal by whistle or probably otherwise, nor at any other time while switching (R. 24). While the cars which killed Toops were being moved,

the end of the train was not protected by a brakeman with a lighted lantern. When placing cars with a kick, it is not customary for anyone to be on the cars with a lantern to warn the other trainmen (R. 39, 40, 54, 56). It is not the habit to whistle while switching in the yards (R. 46).

At the close of plaintiff's evidence petitioner demurred to the evidence on the ground that such evidence did not disclose a cause of action against the petitioner (R. 51). This demurrer was overruled (R. 52). The petitioner introduced evidence to the effect that it was not the custom in switching on the Santa Fe, either at night or in the day time, to have a man on the rear end of cars that were being pushed backward by an engine (R. 54, 55), and also introduced additional evidence that there were no marks on the wheels of the rear car, but marks of blood and flesh on the wheels of all the other cars (R. 52).

The jury made certain special findings of fact, which are as follows:

> Q. No. 1. Was M. G. Toops, the deceased, in charge of the train and switching operations at and before the time he was killed?
>
> Ans. No. 1. Yes.
>
> Q. 2. *a.* Was M. G. Toops killed by coming into contact with the fifteen grain cars that were being placed on the elevator track?
>
> *b.* If you answer the preceding question "Yes" state which car, if any, struck Toops.
>
> A. No. 2. The first car on west end of the fifteen grain cars.
>
> Q. No. *2.* Were there any marks of blood on the rear car of the fifteen grain cars?

A. No. 3. There was no direct evidence to show there was or was not.

Q. 4. Were there marks of blood on the south wheels of all the other grain cars except the rear car?

A. No. 4. Yes.

Q. No. 5. Did Toops know of the coming on the elevator track of the fifteen grain cars?

A. No. 5. He knew they were to come.

Q. No. 6. Was Conductor Toops supplied with a good lantern?

A. No. 6. He had a good lantern.

Q. No. 7. If you answer Q. No. 6 in the affirmative then state if he could have by the aid of said lantern seen the approaching cars.

A. No. 7. No.

Q. No. 8. Had not Toops formerly worked on the Elkhart Branch from Dodge City to Elkhart?

A. No. 8. Yes.

Q. No. 9. Had the yards at Rolla, Kansas, been materially changed since he worked on said line?

A. No. 9. We don't know.

Q. No. 10. State fully in what the negligence of the defendant consisted, if any.

A. No. 10. 1st, in not protecting rear end of 15 grain cars. 2nd, in engineer not sounding signal when starting to back cars around curve and through cut. 3rd, poor condition of track at derail switch (R. 75).

The jury brought in a general verdict in favor of plaintiff for $22,750.00 (R. 75).

The petitioner, before the case was submitted to the jury, had asked the court for a peremptory in-

struction to find for the defendant, which the court refused to give (R. 57).

After the rendition of the verdict the petitioner filed its motion to set aside the verdict and grant a new trial (R. 77); also motion for judgment, notwithstanding the verdict (R. 76). These motions were overruled and the petitioner appealed to the Supreme Court of the State of Kansas.

The case was duly heard in that Court, and on May 4, 1929, the decision of the lower court was affirmed by a divided court, four of the justices holding in favor of affirmance and three for reversal. The majority opinion was written by Justice Hopkins, and the minority by Justice Burch. Within the time fixed by the rules of the court, the petitioner filed a motion for rehearing, which motion was, on July 5th, 1929, overruled without further opinion by the court. The majority and minority opinions are set forth in the transcript of the record.

For a better understanding of the general situation, a copy of the plat showing the station grounds which was used on the trial is attached hereto as an exhibit. Likewise photographs of the tracks at and about where Toops was killed, which also had been introduced in evidence, were made a part of the counter-abstract of appellee, and are found at pages 85, 86, of the record.

Reasons for the Allowance of the Writ.

Your petitioner respectfully represents that the writ of certiorari of this Honorable Court should issue be-

cause the Supreme Court of the State of Kansas has decided a Federal question of substance erroneously and not in accordance with applicable decisions of this Court and other Federal courts, as follows:

1. In holding that the evidence was sufficient to require submission to the jury.

2. In holding that the evidence was sufficient to uphold the jury's finding of negligence on the part of defendant and to support the verdict and judgment.

3. In holding that it was the duty of petitioner to protect the rear end of the cars being switched, and to give a signal when starting to back the cars in the switching operation, contrary to the decisions of this Court and other Federal courts under the Federal Employers' Liability Law.

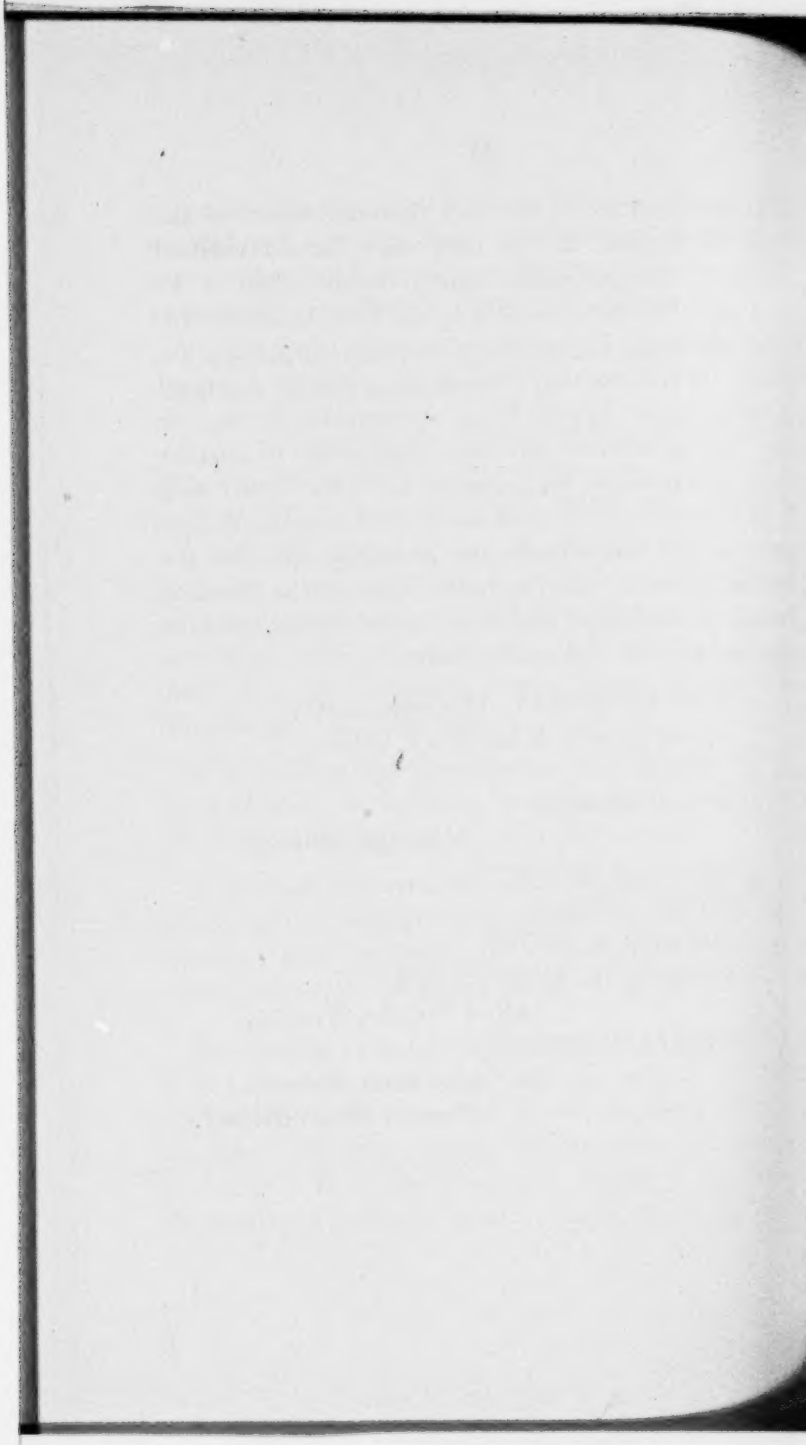
4. In holding that the deceased did not assume the risks incident to the mode and manner in which the switching operations were being performed.

5. Because the verdict and judgment are based wholly upon speculation and conjecture as to how the deceased met his death, and not on any facts from which legitimate inferences could be drawn.

WHEREFORE your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Court, directed to the Supreme Court of the State of Kansas, commanding said Court to certify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the record

of all proceedings of the said Supreme Court of the State of Kansas in the said case therein entitled "Mabel G. Toops, Administratrix of the estate of M. G. Toops, deceased, Appellee, *vs.* The Atchison, Topeka and Santa Fe Railway Company, Appellant, No. 28499," to the end that the said case may be reviewed and determined by this Court as provided by law, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may be appropriate and in conformity with the Act of Congress in such cases made and provided, and that the said judgment of the Supreme Court of the State of Kansas in said case, and every part thereof, may be reversed by this Honorable Court.

THE ATCHISON, TOPEKA AND
SANTA FE RAILWAY COMPANY.
E. E. McINNIS,
Chicago, Illinois;
WILLIAM R. SMITH,
OWEN J. WOOD,
ALFRED A. SCOTT,
ALFRED G. ARMSTRONG,
All of Topeka, Kansas;
WILLIAM OSMOND,
Of Great Bend, Kansas,
Counsel for Petitioner.



SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1929.

No. 303

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

MABEL G. TOOPS, ADMINISTRATRIX OF THE ESTATE OF M. G. TOOPS, DECEASED, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

This Court Has Jurisdiction.

All the questions in this case arise under the Federal Employers' Liability Act, ch. 149, 35 Stat. 65. This case is governed by that Act and the principles of the common law as applied in the Courts of the United States. The plaintiff cannot recover in the absence of negligence on the part of defendant.

Seaboard Air Line v. Horton, 233 U. S. 492, 502.

Except as specified in Section 4 of the Act, the employee assumes the ordinary risks of his employment, and, when obvious or fully known and appreciated by him, the extraordinary risks and those due to the negligence of his employer and fellow employees.

Boldt v. Pennsylvania R. R. Co., 245 U. S. 441, 445.

Ches. & Ohio Ry. v. Nixon, 271 U. S. 218.

If, upon an examination of the record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed.

C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 474.

Toledo, St. L. & W. R. Co. v. Allen, 48 S. Ct. 215.

Atlantic Coast Line v. Davis, 49 S. Ct. 210.

The gist of the petitioner's contention in this case is that the evidence did not support the verdict and judgment; hence under the foregoing decisions, we believe that we are justified in asking the Court to examine the record and see whether our contention is correct.

Statement.

We believe that we have made a sufficiently full statement of the facts of the case in our petition for the writ, and that it will not be necessary to repeat that statement in this brief except so far as it may become proper or desirable to restate some of the facts in the course of the argument.

All that the record discloses regarding the death of Toops is that the front brakeman standing on top of the train or cut of fifteen cars being pushed by the engine discovered a lighted lantern lying on the south side of the track and immediately signalled to the engineer to stop the train, which was done without delay. It was then that the body of Toops was found under the engine tender lying across the track, his feet to the north and his head and right shoulder over the south rail, apparently lying upon his back. His head and one of his arms were cut off. His lantern and hat lay two or three feet to the south of the rail (R. 26). The last time Toops was seen by anyone he was standing on the platform near the station, and just before that he had a conversation with brakeman Hemphill in which they talked about the moving of certain cars on the industry or elevator track. Hemphill testified:

> "Toops asked me if these fifteen cars were all in one cut, and I told him they were, and that I would take them all into the elevator track. He said 'All right, I will look out for them.' And that was the last, I think the last words, that I heard him speak. That is the last thing I said to him" (R. 39).

Where Toops was between that time and the moment of his death, how he got to the place where the cars ran over him, what he was doing when they ran over him, which car struck him first, all are left to conjecture and speculation, there being absolutely no evidence to suggest the true answers to these queries.

As stated in the petition, the verdict and judgment of the lower court for $22,750.00 in favor of the plaintiff were affirmed by the Supreme Court of Kansas, which also approved the finding of negligence made by the jury, to wit: "(1) In not protecting rear end of fifteen grain cars; (2) in engineer not sounding signal when starting" (Finding 10, R. 75).

(In the petition we have referred to the westernmost car of the string of fifteen cars as the rear car. This was the furthest car from the engine, and as the engine was pushing the string of cars, the west car might well be referred to as the first car, rather than the rear car.)

The judgment was affirmed on May 4, 1929, and the opinion of the Supreme Court is reported in Volume 128 of Kansas Reports, page 189, contained in Advance Sheets of May, 1929, 277 Pac. 57. The petitioner's motion for a rehearing was overruled by the Supreme Court of Kansas on July 5, 1929, which constituted the final judgment in the case.

Assignments of Error.

The Supreme Court of Kansas erred:

1. In holding that the evidence was sufficient to require submission of the case to the jury.

2. In holding that the evidence was sufficient to uphold the jury's finding of negligence on the part of defendant and to support the verdict and judgment.

3. In holding that it was the duty of petitioner to protect the rear end of the cars being switched and to

give a signal when starting to back the cars in the switching operation, contrary to the decisions of this Court and other Federal courts under the Federal Employers' Liability Law.

4. In holding that the deceased did not assume the risks incident to the mode and manner in which the switching operations were being performed.

5. Because the verdict and judgment are based wholly upon speculation and conjecture as to how the deceased met his death, and not on any facts from which legitimate inference could be drawn.

6. In affirming the judgment of the court below in favor of the plaintiff (respondent) and against the defendant (petitioner).

ARGUMENT.

The Contention of Your Petitioner is Twofold.

I.

We claim that there was absolutely no evidence to show that the negligent acts found by the jury in the original trial of this case were the proximate cause of the death of Toops. In other words, admitting the Company was guilty of the acts found by the jury, and that those acts were negligent, yet there is no evidence that such negligent acts were the cause of Toops' death.

II.

We contend that, under the decisions of this Court and the Federal courts generally, the acts complained of and found by the jury were not negligent acts as a matter of law.

I.

THERE WAS NO EVIDENCE TO SHOW THAT THE NEGLIGENT ACTS FOUND BY THE JURY WERE THE PROXIMATE CAUSE OF THE DEATH OF TOOPS.

As a matter of fact, this action was brought on suspicion, tried without evidence, and determined on surmise. Taking all of the evidence introduced at the trial, it seems clear to us that the plaintiff failed to show many essential facts which would be necessary to entitle him to go to the jury on the issues. Whatever minor discrepancies there may be in the testimony of the various witnesses for the respondent, several things stand out very clearly.

Toops was conductor in entire charge of the train and its movements. All of the other employees were acting under his direction and subject to his instructions. Although this was his first trip for several years over this line, yet he had formerly worked on this division and was familiar with the general layout. No changes had taken place in the tracks and the surroundings in that part of the yards. He was provided with a good electric lantern. He knew what work was to be done in the yards and talked with his train crew

about such work. He himself assisted in the first part of the switching at Rolla. His work consisted of bringing cars from the side tracks and attaching them to the main train. He talked over with Brakeman Hemphill what should be done with reference to certain grain cars which were to be spotted on the elevator track and which had to be separated from some stock cars. The rest of the train crew started from the main track close to the station platform to attend to the placing of those grain and stock cars and Toops stayed upon the station platform, telling Hemphill, the brakeman, that he, would look out for the grain cars. The crew of said train then picked up the stock and grain cars, placed the stock cars, and were proceeding to place the grain cars on the elevator track. During the time that they were so engaged no one saw Toops or his lantern, and nothing was seen of him by any member of the train crew until his body was found under the wheels of the engine tender at a point adjacent to the derail switch. This was not upon the main line but was upon one of the sidetracks south of the main track. Where was Toops in the meanwhile? What was he doing when the grain cars ran over him? Which car struck him? How did he get to the place where the cars ran over him? If he did not see that the cars were being backed up or kicked in, why did he not see them? If he did see them, why did he permit himself to be struck and killed? These are facts which constitute the very gist of this case, and yet on none of these matters is the slightest evidence given on behalf of the plaintiff. All of these questions are

left to the conjecture of the jury and of the court as to how they should be answered.

In her petition, the respondent alleged that Conductor Toops, after having coupled the air upon the five grain cars, walked to the east end of the station and to a truck which was standing there, where he remained for a few minutes going through his order sheet. That after completing this work he went east approximately 325 feet along the main-line track and to a point north of the derail on the elevator track. That he was conductor and in charge of said train, and that as such conductor it was his duty to assist in spotting cars and switching trains. That his proper position was on the right hand, or the engineer's side, of the train, which in this case was the south side; that it was necessary for him to go south and cross the elevator track in order to reach the south side of the train, and that he carefully, cautiously and while in the line of his duty, proceeded across said elevator track to a point three or four feet east of the derail on the track, with the intention of placing himself in a position to assist at setting the cars to the elevators thereon; that he was in the exercise of his duty in proceeding as above described; that the elevator track at this point was negligently constructed and in a dangerous condition. That the only light Conductor Toops had was the electric lantern and it was necessary for him to carefully watch his footsteps. That just as he stepped on said elevator track he was without warning struck by the west end of the fifteen moving grain cars which had been negligently, carelessly and reck-

lessly kicked in onto the elevator track by the engine crew.

There you have plaintiff's theory of the case. In the evidence we have nothing except that Toops must have moved from the east end of the platform of the station to the point where he was killed. As to the other allegations there is absolutely no proof. What his movements were cannot be known and the trial court and the Supreme Court of Kansas, in approving the work of the jury, could not supply the lack of evidence to prove these very essential facts. The respondent alleged that Toops was struck by the west end of the fifteen moving grain cars. No evidence whatever supports this, but all the evidence indicates he was struck by the second car, because plaintiff's witnesses and those of defendant all agree that there were no marks of blood on the rear car, but that on the second and other cars, up to the engine, marks of blood were found on the wheels, and defendant's witnesses without contradiction state that bits of flesh as well as blood were found on all wheels except those of the rear car (R. 52). This indicates that in some manner he got between the fourteenth and fifteenth cars, and was never struck by the fifteenth.

Of course, it is absolutely a matter of surmise as to how he came to be there between the first and second cars, but at least our surmise may be as plausible and as worthy of belief as that of plaintiff. It might readily be that Toops, having finished whatever work he had been doing, went forward to meet the string of cars that was to be pushed backward by the engine;

that he attempted to get on the top of said cars to ride to the point where the cars were to be spotted and that he attempted this between the first and second car and that for some reason he slipped and fell between the two cars, and that he was then struck and killed by the second car from the rear.

The Supreme Court of Kansas, in the opinion written by Justice Hopkins, indicates that he could not have been attempting to get onto the cars because if he had been so doing his body would not have been found between the rails but would have been on the side of the track. This shows entire unfamiliarity with the structure and arrangement of the ladders on box cars. On every box car there is a ladder at each end on the side of the car, and in addition to these ladders on the side of the car there are also ladders on the end of the car, right around the corner from the side ladders, and it might very readily be that Toops caught onto the side ladder and swung around to the ladder on the end for the purpose of reaching the top of the car; and this would thoroughly explain how it was that he may have fallen and his body might have been found between the rails. Of course, this is pure surmise, but it does not seem so improbable as the explanation given by the jury and approved by the trial court, and afterwards by the Supreme Court of Kansas.

In the course of the majority opinion written by Justice Hopkins of the Supreme Court, he makes use of the following language:

> "The deceased was not familiar with the elevator track. He approached it in the dark from

the north for the first time in thirteen years. He is presumed to have been exercising due care and it may therefore be assumed that when he arrived at the track and attempted to cross it he listened for signals and heard none; that he looked for approaching cars with a light, and saw none, and that he stepped upon the defective track for the purpose of crossing over and instantly became aware that the kicked cars were upon him, but on account of the defective condition of the track it was impossible for him to escape; that in making an effort to escape he was knocked down, and as he fell forward his hat, lantern and pencil were propelled to the south side of the track. On account of the curve in the track his lighted lantern (which was thrown or fell out of his hand), could not be seen by the crew. The position of the body indicates that he was knocked down by the west end of the moving grain cars. His train book, containing 34 or 35 bills, dropped into the center of the track, between the rails, and was lying two or three feet east of his body."

The various assumptions made by the Supreme Court *are* assumptions, or surmises, and are without any evidence whatever to support them. The statement made by Justice Hopkins corresponds very largely with the theory of the respondent in her pleadings and evidence. While it possibly might be true that these were the actual facts, yet this court cannot say, nor can any court, that these were necessarily the facts. Any other theory, equally plausible, would prevent the inferences that were made by the Supreme Court of Kansas. Take, for instance, the idea or theory that

he was struck by the rear car in the train. He might have fallen, as suggested by the court, on account of the fact that there was very little dirt between the ties and a good many weeds and thistles. There is no evidence that they in any way interfered with his crossing over the track, if he were so doing. He may have been intending to cross over the track, if we find that he was really struck by the rear car, of which fact there is no evidence; or he may have stumbled over a rail instead of a tie or on account of being entangled in the weeds. No way has yet been discovered of operating a railroad without the use of rails, and one could just as easily fall over a rail as stumble on a tie that was insufficiently ballasted. One theory is just as plausible as another as to how he might have got under the train. In the opinion of Justice Hopkins, he says:

> "Inasmuch as he had come south to cross the track it is natural to conclude that when he was struck his pencil and lantern were thrown out and away from the track. His train book with the bills in it was found in the center of the track between the rails and east of his body, indicating that he was carrying the train book in his left hand at the time he was struck and dropped it in the center of the track. Had he attempted to climb on the train and fallen off, the train book would undoubtedly have been found in his pocket."

If such inferences can be made in the trial of a lawsuit, evidence would not seem to be a necessary part of the trial.

In another place in his opinion, the Supreme Court of Kansas says:

> "He did not know that they would come silently down upon him, without a white light on the leading car."

We desire particularly to call attention to the use of the word "silently." There is absolutely no evidence to show that the cars were moving silently. Such a thing as a silent movement of cars is hardly conceivable, and especially would this be the case where the cars were coming, as they were in this case, around a rather sharp curve. The friction of the wheels on the rails always produces a noise that can be heard from a great distance. Every time a car passes from one rail to another a distinct click can be heard. Whenever cars bump against each other in making up a train a noise is distinctly heard from the concussion through the entire length of train. The night was a dark night. This would undoubtedly interfere with vision, but certainly it would not interfere with hearing. The hour was a little after midnight and there would be nothing to interfere with the transmission of sound. As we have said, moving cars always make a sound and this is especially perceptible in the late hours of the night. At that time one can hear in the city the approach of street cars and the movement of trains at a considerable distance from where one lies abed. We can only surmise, as the court below seems to have done, that Toops was unaware of the approach

of the cars which ran over him. Of course, if Toops was aware of the approach of the cars, the absence of a brakeman and a lighted lantern on the rear of the approaching cars, or the failure of the engineer to give any signals, would make no difference. The object of these regulations, if there are such regulations, would be simply to apprise one of the presence and approach of the cars, and if he actually knew of this, there would be no occasion for signals.

The jury specially found that Toops had a good electric lantern, and then they made an additional finding; that Toops could not have seen the approaching cars by the aid of his lantern. There is not a syllable of evidence to support this finding. One of the objects in furnishing trainmen with a lantern is that they may be enabled to see approaching cars. Of course, they are also used for signals, but just as much to enable the one using them to go among cars without receiving injury. The rear brakeman, Hemphill, was also supplied with a good electric lantern and the front brakeman, Nolan, was supplied with an oil lantern. The conductor, Toops, Hemphill and Nolan, by the aid of these lanterns had assembled cars for switching, had made couplings, had changed switches, and had done all of the things ordinarily done in the operation of switching. If the brakemen were able to do these things as indicated, it is impossible to see why Conductor Toops was not able to do the same. With the aid of his lantern, he had assisted in the movement of cars and in attaching them to the train on the main track at an earlier time in said night. To do this it

was necessary for him to see the approach and movement of the cars he was to handle and the only way that he could see them, aside from the starlight, was by the aid of his lantern; and it is certainly presumptuous, in the absence of evidence, for the jury to say that Toops could not have done the same thing.

Admitting, however, for the sake of argument, that the jury was right in finding that Conductor Toops was not able to see the approaching cars by the aid of his lantern, then it would seem to us that the final analysis of the situation would be that the accident was due to the inefficiency of the lantern and Toops' consequent inability to see the cars approaching and possibly the surrounding situation as to tracks. Toops used this lantern at least all the time after the train stopped at the station of Rolla. If the lantern was inefficient and was not able to do what a lantern is intended for and is expected to do, then no one was more aware of the inefficiency of the lantern than Toops himself. Toops, in using an ineffective agency, of which he must have had knowledge, would seem to us, under the rule laid down as to master and servant, to have assumed a risk of his employment, and therefore would not be entitled to recovery.

It is therefore seen that the three grounds of negligence found by the jury—the failure to protect the rear end of the grain cars, the failure of the engineer to give a signal when starting to back cars around the curve and through the cut, and the poor condition of the track at the derail switch—did not necessarily have anything to do with the death of Toops.

In the opinion of Justice Hopkins he lays considerable stress upon a distinction which he finds between stations and railroad yards. He admits that petitioner's argument would be entirely correct and decisive if it applied to railroad yards. He quotes the rules of the company and definitions therein:

> "Station.—A place designated on the time table by name at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated."
>
> "Yard.—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time table, or by train order, may be made, subject to prescribed signals and regulations."
>
> "Sec. 102. When cars are pushed by an engine (except when shifting in making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need."
>
> "Sec. 24. When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

These last two rules, he says in effect, do not apply because the place where the accident occurred was not a yard but was a station. The confusion in his mind, in our opinion, seems to have arisen from the fact that stations and yards are defined separately. Certainly the definition of "yards" as quoted above covers the situation at Rolla. There was a place for the making up of trains, storing of cars and other purposes and

movements not authorized by the time table or by train orders might be made there. It seems to us that the trouble arises from the idea that the rules of the railroad classify stations on its tracks; that is, that it calls some of them "stations" and calls others "yards." There seems to be no basis in the testimony nor in fact for such a classification. In performing switching operations, the fact that the yards might also be at a station, it would seem to us, would make absolutely no difference. The rules do not seem to attempt to strictly distinguish stations from yards. We might say, for instance, that in the State of Kansas cities were divided into three classes: first, second, and third. Under this classification, a city could not belong to more than one class, as that would be a matter of population, etc. But there is nothing to prevent having yards at stations; in fact, almost every station has switches, sidetracks and yards in which to do switching, storing of cars, and other matters incident to the operation of a railroad. The station, as a station, has one purpose, principally the control of trains by telegraphic orders; the yards have another; and it seems rather forced to say, as the court in Kansas does say, that Rolla is a station, and not a yard, and therefore not covered by the rule with reference to switching, regardless of the purpose for which the tracks are used. Whether the yards be large or small, the rule with reference to protecting the other members of the switching crew from injury would probably be the same. It is a matter of construction of the definition and certainly the definition of "yards" would

cover the station at Rolla. If there is any ambiguity about the rule, the practical construction placed upon it by trainmen, as shown by the evidence, was that it was not the custom in handling and switching cars at stations to observe the rule which might be applied to "stations," and not the rule as to "yards." That is, it was not the custom to have a lighted lantern on the rear of the car, or brakeman located there, except where the switching was going on over a highway crossing. It is true that there was a highway crossing over the station grounds at Rolla, but it was several hundred feet west of the place where the accident occurred.

A common-sense definition of the word "yards" is to be found in *George v. Quincy, O., & K. C. R. Co.*, 139 Mo. Ct. Ap. 283. The matter is summed up in the first paragraph of the syllabus:

> "Rev. St. 1909, Sec. 3163, requires railroads to block all switches, frogs, and guard rails 'in all yards, divisional and terminal stations, and where trains are made up.' HELD, that the word 'yards' was not limited to yards maintained at divisional or terminal stations, or where many parallel tracks are maintained, and cars habitually switched, but included a way station at which there was a system of tracks where cars could be cut out of a train and stored, loaded or unloaded, or delivered to connecting lines, and where switching was customarily or habitually, though not constantly, carried on."

In the course of the opinion in the George case, Justice Trimble uses the following language:

"Every one knows that every railroad station has a 'yard' of its own, by which is meant a place or piece of ground, usually within certain reasonable limits, though not necessarily inclosed, surrounding the depot or station, and used to switch and stand cars therein for the purpose of loading or unloading freight handled at that point, and for other purposes connected with the railroad business transacted at such station. Such place, in ordinary language, used by the persons in charge of such stations, as well as by the public doing business thereat, is termed a 'yard.' And in it there is always more or less switching to be done in order to deliver and take away cars at said station." * * * (p. 154).

The following principles applicable to cases arising under the Federal Employers' Liability Act have been enunciated by the Supreme Court of the United States.

In case of accident to an employee, he must prove not only the cause which operated to produce the injury, but also some negligent act or omission of the employer in which the cause of injury originated. The fact of accident does not warrant an inference of negligence. Negligence is an affirmative fact which must be established by evidence. When the evidence leaves cause of injury in doubt, and any one of several things may have been the cause, the jury may not choose one of them by guess, and find negligence without a satisfactory basis for the conclusion. With the presumption that the injured employee used due care goes the correlative presumption that the employer used due care. This presumption must be overcome by evidence. When circumstantial evidence is relied on to prove a

fact, the circumstances must be proved. The circumstances must not themselves be presumed, and one presumption cannot be built upon another.

Patton v. Texas and Pacific Ry. Co., 179 U. S. 658.
Looney v. Metropolitan R. R. Co., 200 U. S. 480.
Chi., Rock Island & Pac. Ry. v. Bond, 240 U. S. 449.
New Orleans & N. E. R. R. Co. v. Harris, 247 U. S. 367, 371.
C., M. & St. P. Ry. v. Coogan, 271 U. S. 472.

In the *Patton* case, in the syllabus, it is said:

> "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employee to establish, that the employer has been guilty of negligence: * * * in the latter case, it is not sufficient for the employee to show that the employer may have been guilty of negligence, but the evidence must point to the fact that he was; and where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion."

In the *Looney* case, it is held that in an action for damages for personal injuries, while the defendant has the burden of proof of contributory negligence, the

plaintiff must establish the grounds of defendant's liability; and to hold a master responsible a servant must show by substantive proof that the appliances furnished were defective, and knowledge of the defect or some omission in regard thereto. Negligence of defendant will not be inferred from the mere fact that the injury occurred, or from the presumption of care on the part of the plaintiff. There is equally a presumption that the defendant performed his duty.

In the *Harris* case, it is held that rights and obligations under the Federal Employers' Liability Act depend upon it, the principles of common law are applicable and negligence is essential to recovery, and in the course of the opinion the court says:

> "The federal courts have long held that where suit is brought against a railroad for injuries to an employee resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish." * * *

The *Coogan* case is the one particular case upon which petitioner relied in the trial of this case before the jury and also in its contention before the Supreme Court of Kansas. In that case at the close of the evidence the petitioner moved the court to direct a verdict in its favor on the ground, among others, that respondent had failed to prove any actionable negligence on the part of the petitioner, and that any verdict for respondent would be based upon speculation and conjecture, and in the decision this contention on the part of the petitioner was sustained. Again, the

court holds that the rights and obligations of the petitioner depend upon the Employers' Liability Act and applicable principles of common law as interpreted by the federal courts; that the Supreme Court should examine the record and if it is found that, as a matter of law, the evidence is not sufficient to sustain the finding, and that the carrier's negligence was the cause of the death, judgment should be reversed. The contention of the respondent was that a stretch of pipe line about fifteen feet in length had been loosened and bent three or four inches toward the rail, and that this condition of affairs had lasted for some months. The court says:

> "The evidence is sufficient to warrant a finding that there was a breach of duty in this respect. But the precise question for decision is whether the condition of the pipe caused or contributed to cause the death of deceased. * * *

and the court held that there was not sufficient evidence connecting the injury with the negligence so found. Quoting from the decision, the court says:

> "It follows that, unless the evidence is sufficient to warrant a finding that the death resulted from the catching of deceased's left foot under the bent part of the pipe line, the judgment cannot be sustained. As there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. * * * There is nothing to show

that the pipe had any connection with the accident. The fact that deceased was run over and killed at the time and place disclosed has no tendency to show that his foot was caught. One between cars coupling the air hose is very liable to be run over if the train is unexpectedly moved. A finding that his foot was not caught under the pipe is quite as consistent with the evidence as a finding that it was.

"It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding. * * * When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of respondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture."

Giving the foregoing decisions and others their full force and effect, it would seem to us that upon this branch of the case there must be a holding that even if the so-called acts of negligence had been proven, yet in the absence of proof that the injury was due to any one of the so-called acts of negligence the decision must be in favor of the petitioner.

II.

UNDER THE DECISIONS OF THIS COURT AND OF THE FEDERAL COURTS GENERALLY, THE NEGLIGENT ACTS COMPLAINED OF AND FOUND BY THE JURY WERE NOT NEGLIGENT ACTS AS A MATTER OF LAW.

But there is on the other branch of the case a very serious question as to whether the negligence found by the jury in answer to special question No. 10 would constitute actionable negligence. Question No. 10 submitted to the jury was as follows:

> State fully in what the negligence of the defendant consisted, if any.
>
> Answer First. In not protecting the rear end of the fifteen grain cars.
>
> Second. In engineer not sounding signal when starting to back cars around curve and through cut.
>
> Third. Poor condition of track at derail switch.

The second ground of negligence, that the engineer did not sound signal when starting to back cars around curve and through cut, has no evidence to support it so far as "through cut" is concerned. It is true that the engineer was sending the cars around a curve, but, as to the "cut," the evidence shows that on the south side of the track the ground was higher, possibly six or eight feet higher, but not that there was a cut there, and the north side of the track was the natural surface of the ground, the same as the rest of the yards, and

a person looking from east of the depot toward the track would not have his view impeded by anything on the north side of the track. This will be plainly seen in the photograph attached to the transcript of the record.

In the very recent case of *Kansas City Southern Railway Company v. Jones,* 276 U. S. 303, the court says:

> "No one saw the death, but the body was found between the main track and a parallel track, and the probability is that Ferguson was killed by a train going north on the former. A freight train was being made up on the parallel track, and the hypothesis of the respondent, supported by little if anything except the place where the body and the lantern of the deceased were found, is that Ferguson was engaged in inspecting the cars, and so absorbed in his work that he did not hear the approaching train but was relying upon the ringing of the engine bell, which usually was rung but which the respondent's witnesses say was not rung on this occasion. The court below sustained the verdict on this ground. Ferguson was seen not later than a quarter before seven in the evening, so far as the time can be fixed. The train passed at five minutes after seven, the time at which it was known by him to be due. His body was found at twenty-five minutes after seven. He was an experienced man. The indications are that there was nothing for him to inspect at the probable time of his death. At best it is a mere guess that he was so engaged, still more that he was absorbed in such work. The main track was straight and the train was making a great

> noise and showing a bright light as it approached. Nothing except imagination and sympathy warranted a finding that the death was due to the negligence of the petitioner rather than to that of the man himself." * * *

The latest expression of the Supreme Court of the United States is to be found in the case of *Toledo, St. Louis & Western R. R. Co. v. Allen*, 276 U. S. 165, and inasmuch as all of the principles involved in actions like the present one are somewhat fully discussed, we quote quite freely from this case:

> "October 27, 1922, petitioner's railway system was being operated by a receiver as a common carrier of interstate commerce. Respondent was a car checker in the service of the receiver; and, while employed in such commerce in petitioner's railroad yard at Madison, Illinois, he was struck and injured by a shunted car. He brought this action in the Circuit Court of Saint Louis, Missouri, claiming damages under the Employers' Liability Act, U. S. C., Tit. 45, c. 2, Section 51. * * *
>
> "The yard where plaintiff was injured included a lead track, and connected with it, a number of parallel switch tracks, the centers of which were about twelve feet apart. Plaintiff had been regularly employed there as a car checker for about eighteen months, and his hours were from 11 in the evening to 7 in the morning. His work required him to be in the yard while switching was being done and to go from place to place to check and list cars that had been switched and arranged on various tracks for the purpose of making up trains.

"At the time of the accident he was checking a string of cars that had been placed on Track 5, and was between it and Track 4, about 125 yards from the lead. A switching crew was at work in the yard. The engine was on the lead attached to from twenty to twenty-five cars that were between it and Switch 4. Two cinder cars were detached from the end while the string of cars was being pushed by the engine.

"They were shunted by means of the switch to Track 4, and by their momentum moved to the place where plaintiff was struck. The yard was not artificially lighted. It was an ordinary starlight night, without moon. The shunted cars moved at moderate speed—4 to 6 miles per hour—and made noise enough to be heard at a distance of one or two car lengths. They were unlighted and unattended, and no person warned plaintiff of their approach.

"The Act of Congress under which plaintiff seeks recovery took possession of the field of liability of carriers by railway for injuries sustained by their employees while engaged in interstate commerce, and superseded state laws upon that subject. *Second Employers' Liability Cases,* 223 U. S. 1, 55. This case is governed by that act and the principles of the common law as applied in the courts of the United States. The plaintiff can not recover in the absence of negligence on the part of defendant. *Seaboard Air Line v. Horton,* 223 U. S. 42, 502.

"And, except as specified in Section 4 of the Act, the employee assumes the ordinary risks of his employment, and when obvious or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employees. *Boldt v. Penn-*

sylvania R. R. Co., 245 U. S. 441; *Ches. & Ohio Ry. v. Nixon*, 271 U. S. 218. If, upon examination of the record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed. *C. M. & St. P. Ry. Co. v. Coogan*, 271 U. S. 472, 474. * * *

"Defendant did not owe to plaintiff as high a degree of care as that due from carriers to their passengers or others coming on their premises for the transaction of business. The reason for the distinction is that plaintiff's knowledge of the situation and the dangers existing because of the narrow space between the tracks was at least equal to that chargeable against the defendant. *Missouri Pacific Railroad Co. v. Aeby*, 275 U. S. 426; 48 Sup. Ct. R. 177. The rule of law which holds the employer to ordinary care to provide his employees a reasonably safe place in which to work did not impose upon defendant an obligation to adopt a rule for the spacing or construction of its tracks and yards. *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, 529.

"Carriers like other employers, have much freedom of choice in providing facilities and places for the use of their employees. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. *Tuttle v. Milwaukee Railway*, 122 U. S. 189, 194; *Randall v. Baltimore & Ohio R. R. Co.*, 109 U. S. 478, 482; *Washington, etc., Railroad Co. v. McDade*, 135 U. S. 554, 570. * * *

"And the Court authorized the jury to find the defendant negligent in failing to cause the

engine bell to be rung and in sending the cars along Track 4 without a light and unattended. The opinion below declares that the starting or running of the switch engine without ringing a bell or blowing a whistle was evidence of negligence; and that if, according to the practice, cars could be shunted dangerously near to the place where plaintiff was working, without any warning to him or knowledge of such custom or practice on his part, the system of doing the work was not reasonably safe and plaintiff was not provided with a reasonably safe place in which to work and did not assume the risk.

"Obviously the ringing of the bell when and after the cinder cars were uncoupled or when the engine started or while it was running would not have been useful as a warning to plaintiff. When the cars were detached, he was from three to four hundred feet from the lead track and the engine was at the other end of the string of cars. The decision on this point is contrary to the rule followed in the Federal Courts. *Aerkeltz v. Humphreys,* 145 U. S. 418, was a case presenting a situation similar to that here involved. It is there said (p. 420): 'The ringing of bells and the sounding of whistles on trains moving forwards and backwards, would have simply tended to confusion.' And see *Rosney v. Erie R. Co.,* 135 Fed. 311, 315; *Connelley v. Pennsylvania R. R. Co.,* 201 Fed. 54, 57.

"And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that

he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it cannot be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car. *Aerkeftz v. Humphreys, supra.*

"In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him. *Boldt v. Pennsylvania R. R. Co., supra; Ches. & Ohio Ry. v. Nixon, supra; Randall v. Baltimore & Ohio R. R. Co., supra; Tuttle v. Milwaukee Railway Co., supra.* • • •

"There is no claim that he was not about his work in the usual way or that he could not have avoided the cars if he had known they were coming. A slight movement on his part would have been enough. When the engine pushed the string westerly along the lead to give the cinder cars momentum, the field man was on the south side of the lead and turned switch 4 to shunt them on that track. There is no evidence that he saw plaintiff or knew where he was while the switching movement was being made.

"The foreman of the crew was on the north side near the westerly end of the string of cars. He lifted the coupling pin to detach the cinder cars and gave signals for the starting and stopping of the engine in order to give them the desired impulse. He saw the lantern carried by plaintiff on the north side of the cars on track

5 and assumed that plaintiff was at work there. Plaintiff's son was the other switchman. He was on the north side near the middle of the string of cars and received from the foreman and transmitted to the engineer the signals for the starting and stopping of the engine. He also saw plaintiff's lantern. Neither engineer nor foreman knew where plaintiff was.

"The mere fact that the foreman and plaintiff's son saw the lantern and knew that plaintiff was checking cars on track 5 is not sufficient. There is nothing to sustain a finding that plaintiff was in any danger other than such as was usually incident to his employment or that any member of the crew knew or had any reason to believe that he was oblivious of the situation. *Illinois Central Railroad Co. v. Ackerman,* 144 Fed. 959, 962.

"In the absence of knowledge on their part that he was in a place where he was liable to be struck and oblivious of that danger, they were not required to vary the switching practice customarily followed in that yard, or to warn or to take other steps to protect him."

In *Elliott on Railroads,* Vol. 3, Second Edition, paragraph 1258, it is said:

"Even as to employees the company is under no obligation to ring the bell or sound the whistle upon a switching engine engaged in making up trains in its yards, for the purpose of notifying such employees, who are familiar with the operation of the yard."

We refrain from extending this brief and discussion because the contention of petitioner is so fully and

forcibly set forth in the dissenting opinion of Justice Burch (which opinion is copied in full in the Transcript of the Record, pages 106-116 that little can be added which would be of assistance to this Court in analyzing the situation, applying the law and arriving at a conclusion. We respectfully request the Court to read and carefully consider this dissenting opinion. In conclusion we desire to call attention of the Court to the fact that if Toops was in a position of danger, absolutely no one knew of such position.

Respectfully submitted,

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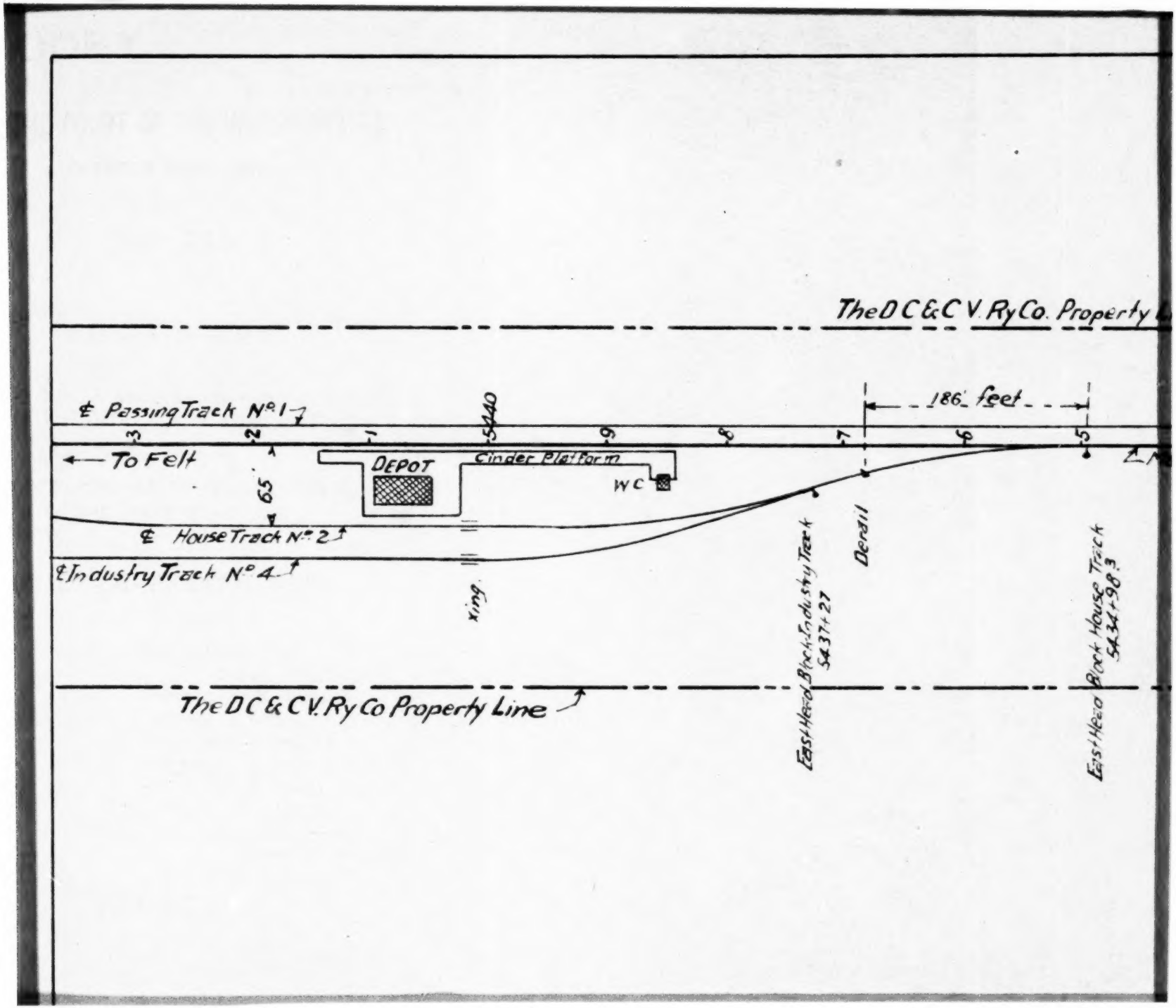
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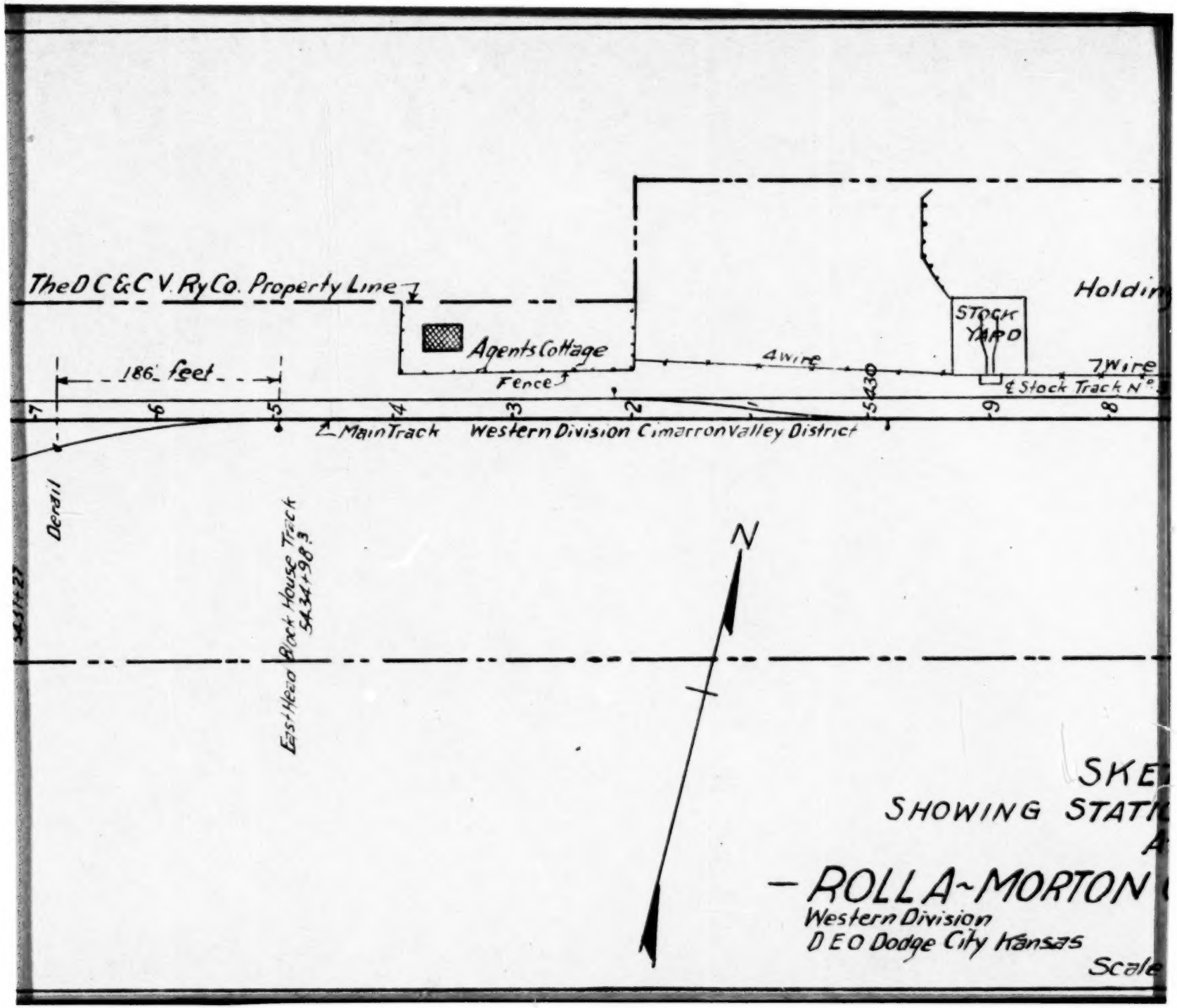
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Western Division
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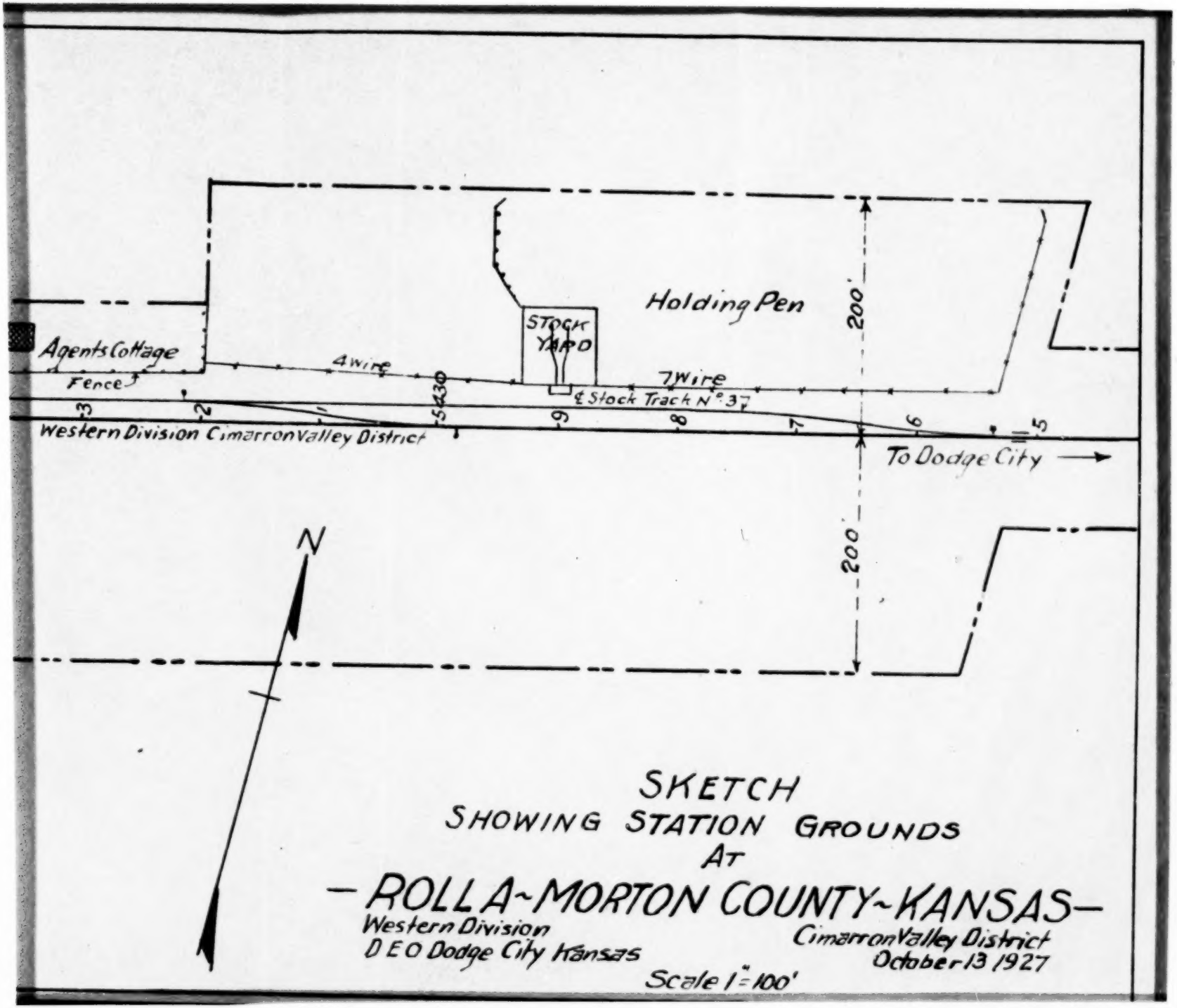
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AT
-ROLLA~MORTON COUNTY~KANSAS-
Western Division
D E O Dodge City Kansas
Cimarron Valley District
October 13 1927
Scale 1"=100'

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

No. 303

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

MABEL G. TOOPS, ADMINISTRATRIX OF THE ESTATE OF M. G. TOOPS, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF PETITIONER

E. E. McINNIS,
Chicago, Illinois,
WILLIAM R. SMITH,
OWEN J. WOOD,
ALFRED A. SCOTT,
ALFRED G. ARMSTRONG,
All of Topeka, Kansas,
WILLIAM OSMOND,
Great Bend, Kansas,
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(34,434)

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No. 303

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

vs.

MABEL G. TOOPS, ADMINISTRATRIX OF THE ESTATE OF M. G. TOOPS, DECEASED, RESPONDENT.

BRIEF OF PETITIONER

STATEMENT.

This cause comes on for determination on a writ of certiorari issued to the Supreme Court of the State of Kansas. The case of The Atchison, Topeka and Santa Fe Railway Company, Appellant, against Mabel G. Toops, Administratrix of the estate of M. G. Toops, deceased, Appellee, was decided by the Supreme Court of the State of Kansas on May 4, 1929. The opinion of the court is reported in Volume 128 of Kansas Reports, page 189.

The petitioner in due time filed a motion for a rehearing which was overruled by the Supreme Court of Kansas on July 5, 1929, and this constituted the final judgment in the case.

It is conceded that all the questions involved in this case arise under the Federal Employers' Liability Act, ch. 149, 35 Stat. 65. This case is governed by that Act and the principles of the common law as applied in the Courts of the United States. The plaintiff cannot recover in the absence of negligence on the part of defendant.

Seaboard Air Line v. Horton, 233 U. S. 492, 502.

Except as specified in Section 4 of the Act, the employe assumes the ordinary risks of his employment, and, when obvious or fully known and appreciated by him, the extraordinary risks and those due to the negligence of his employer and fellow employes.

Boldt v. Penn. R. R. Co., 245 U. S. 441, 445.

Ches. & Ohio Ry. v. Nixon, 271 U. S. 218.

If upon an examination of the record it is found that as a matter of law the evidence is not sufficient to sustain the special findings of fact, the judgment will be reversed.

C. M. & St. P. Ry. Co. v. Coogan, 271 U. S. 472, 474.

Toledo, St. L. & W. R. Co. v. Allen, 48 S. Ct. 215.

Atlantic Coast Line v. Davis, 49 S. Ct. 210.

Under Rule 38 of the Rules of the Supreme Court of the United States, Section 5 provides:

> "That certiorari may be granted (a) where a state court has decided a federal question of substance not theretofore determined by this court; or has decided it in a way probably not in accord with applicable decisions of this court."

This action was brought in the District Court of Reno County, Kansas, by Mabel G. Toops, Administratrix of the estate of M. G. Toops, deceased. The evidence discloses that M. G. Toops had been in the employ of the petitioner as a conductor, and as such had worked on various parts of the Santa Fe system. He was killed at the station of Rolla, Kansas, while both he and the petitioner were engaged in interstate commerce on August 13, 1926, at about 1:00 a.m., while acting as the conductor of a train running from Elkhart to Dodge City, both in the State of Kansas. Some years prior to the date of his death he had worked as a brakeman on said division, and through the station of Rolla, but this was the first trip made by him over this line for a number of years.

Rolla is a small station on the Elkhart Branch of the petitioner. At such station there is a main line, a passing switch, a house track and an elevator track; on the south side of the elevator track there is a bank of earth probably six to eight feet high. There is no cut through this elevation, the grounds on the north being level. As conductor, Toops was in charge of the train (R. 29). Shortly after midnight the train reached the station of Rolla and cars were being switched in the yards at such station at the time Toops met his death. The movements of the cars consisted in the placing of stock cars which were already at the station, cars from the train, and rearranging the location of certain grain cars. In the early movements of the crew in placing and moving cars, Mr. Toops took a part assisting in the switching of certain cars which were attached

to the train on the main track, and the coupling of which was made by Toops himself.

The last time Toops was seen by any of his co-employes or by any other person, he was standing on the platform near the station, and just before that he had a conversation with the rear brakeman, W. F. Hemphill, in which they talked about the moving and resetting of certain cars on the industry or elevator track; and at that time Toops told the brakeman to attend to the moving of these cars, and Toops said, "All right, I will look out for them," and these were the last words Hemphill heard him speak (R. 25-30). The night was a dark night. Conductor Toops was supplied with a good electric lantern and the rear brakeman had a similar lantern, while the front brakeman had an oil lantern. A few hundred feet east of the platform where Toops was last seen there is a switch running from the main line, and about 200 feet east of the station the track divided, one track, called the house track, running directly west past the station and an elevator track running a little south of the house track. After locating various cars, the remainder of the crew were engaged in placing fifteen grain cars which they intended to spot on the elevator track. These cars were run from their original position up on to the main line track, and then pushed back on to the track which divided into the house track and the elevator track. The engine was pushing these cars from the east to the west. There were fifteen of these cars. At the time Toops' body was discovered both the front and rear brakemen were on the top of

this cut of cars but neither of them was on the rear car. Each was supplied with a lantern. About 100 feet east from where the track divided there was a derail switch. While moving past this derail switch the front brakeman from the top of the train discovered a lighted lantern lying beside the track on the south side, and he immediately signalled to the engineer to stop the train, and this the engineer did as soon as possible.

It was then that the body of Toops was found under the engine tender, lying across the track, his feet to the north and his head and right shoulder over the south rail. He seemed to be lying upon his back; his head and arms were cut off, his lantern and hat were lying two or three feet to the south of the rail. At the time that his body was discovered, after stopping the train, his shoulders laid against the derail switch about 100 feet east of where the switch track left the main track (R. 41). On this side-track the ground between the ties was not filled to the surface, but there was some dirt between the ties. From the marks on this dirt it would seem that the body had been moved a short distance from the place where it was originally struck. After discovering the body of Toops the train crew and others who had come to the scene, examined the trucks of the fifteen cars which the engine was pushing. No blood was found on the rear car by any of the witnesses who examined it that night. The same witnesses examined it the next morning again. At both times marks of blood were found on all the wheels of the first fourteen cars from the engine, and also

on the wheels of the engine tender. There were also bits of flesh on the wheels of all except the rear car (R. 41). Along the track on this switch there were weeds growing. Between the rails Mr. Toops' pencil and waybills were found. The theory of the plaintiff as set out in her petition was that Toops was walking up this track, or alongside of it from the station, and that he was struck by the rear car, and knocked down, and the rear car passed over him without doing any injury, and that then the next car cut off his arm and head; that the state of the track and the weeds had something to do with the injury. (See copy of petition, R. 4-13.)

The rules of the Railway Company give the following definitions:

"*Station.* A place designated on a time-table by name at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated.

"*Yard.* A system of tracks within defined limits and provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time-table, or by train order, may be made, subject to prescribed signals and regulations."

Section 102 of the rules reads: "When cars are pushed by an engine (except when shifting or making up trains in yards) a flagman must take a conspicuous position in front of the leading car and signal the engineman in case of need."

Section 24 reads: "When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

Rule 396 required the conductor to attend personally to the switching and the testimony of plaintiff's witness Nolan was:

"If he tells me to do something as a brakeman, it is my duty to do it. If he tells Hemphill to do something, it is Hemphill's duty to do it. If he tells the engineer to do something, it is his duty to do it. Conductors have entire charge of the switching operations and the others simply work under him." (R. 20-21.) Before moving the cars which ran over Toops the engineer gave no signal by whistle, or probably otherwise, nor did he do so at any other time while switching (R. 24). While the cars which killed Toops were being moved the end of the train was not protected by the brakeman with a lighted lantern. When placing cars by a kick it is not customary for anyone to be on the cars with a lantern to warn the other trainmen (R. 42). It is not the habit to whistle while switching in the yards (R. 35).

At the close of plaintiff's evidence petitioner demurred to the evidence on the ground that such evidence did not disclose a cause of action against the petitioner (R. 40). This demurrer was overruled (R. 40).

Whereupon the petitioner introduced evidence to the effect that it was not the custom in switching on the Santa Fe, either at night or in the daytime, to have a man on the rear end of cars that were being pushed back by the engine, and introduced additional evidence that there were no marks on the wheels of the rear car but marks of flesh and blood on the wheels of all the other cars.

Photographs of tracks and derail switch are to be found at pages 66 and 68 of record. Plat of station grounds is attached as an exhibit to this brief.

The jury returned a verdict in favor of the plaintiff for the sum of $22,750.00, and also made the following findings of fact (R. 60):

SPECIAL FINDINGS OF FACT.

Q. No. 1. Was M. G. Toops, the deceased, in charge of the train and switching operations at and before the time he was killed?

A. No. 1. Yes.

Q. No. 2. a. Was M. G. Toops killed by coming into contact with the fifteen grain cars that were being placed on the elevator track?

b. If you answer the preceding question "Yes" state which car, if any, struck Toops.

A. No. 2. The first car on west end of the fifteen grain cars.

Q. No. 3. Were there any marks of blood on the rear of the fifteen grain cars?

A. No. 3. There was no direct evidence to show there was or was not.

Q. No. 4. Were there marks of blood on the south wheels of all the other grain cars except the rear car?

A. No. 4. Yes.

Q. No. 5. Did Toops know of the coming on the elevator track of the fifteen grain cars?

A. No. 5. He knew they were to come.

Q. No. 6. Was Conductor Toops supplied with a good lantern?

A. No. 6. He had a good lantern.

Q. No. 7. If you answer Q. No. 6 in the affirmative then state if he could have by the aid of said lantern seen the approaching cars.

A. No. 7. No.

Q. No. 8. Had not Toops formerly worked on the Elkhart branch from Dodge City to Elkhart?

A. No. 8. Yes.

Q. No. 9. Had the yards at Rolla, Kansas, been materially changed since he worked on said line?

A. No. 9. We don't know.

Q. No. 10. State fully in what the negligence of the defendant consisted, if any.

A. No. 10. First, in not protecting rear end of fifteen grain cars; second, in engineer not sounding signal when starting; third, poor condition of track at derail switch.

Before the case was submitted to the jury petitioner had asked the court for a peremptory instruction to find for the defendant, which the court refused to give (R. 45).

The petitioner filed its motion to set aside the verdict and grant a new trial (R. 62).

Also, its motion for judgment notwithstanding the verdict (R. 61).

These motions were overruled and the petitioner appealed to the Supreme Court of the State of Kansas.

The case was duly heard in that court and the decision of the lower court was affirmed by a divided court, four of the Justices holding in favor of affirmance and three for reversal. The majority opinion was written by Justice Hopkins and the dissenting opinion by Justice Birch.

Within the time fixed by the rules of the court petitioner filed a motion for rehearing which was overruled on July 5, 1929, without further opinion of the court. The majority and minority opinions are set forth in the transcript of the record (R. 69, 85).

For a better understanding of the general situation, a copy of a plat showing the station grounds, which was used in the

trial, and introduced in evidence, is attached hereto as an exhibit. Photographs of the track at or about where Toops was killed, which were also introduced in evidence, are to be found opposite pages 66 and 68 of the record.

SPECIFICATION OF ERRORS.

The petitioner alleges that the Supreme Court of Kansas decided a Federal question of substance erroneously and not in accordance with applicable decisions of this Court and other Federal Courts in the following particulars:

1. In holding that the evidence was sufficient to require submission to the jury.

2. In holding that the evidence was sufficient to uphold the jury's finding of negligence on the part of defendant and to support the verdict and judgment.

3. In holding that it was the duty of petitioner to protect the rear end of the cars being switched, and to give a signal when starting to back the cars in the switching operation, contrary to the decisions of this Court and other Federal Courts under the Federal Employers' Liability Law.

4. In holding that the deceased did not assume the risks incident to the mode and manner in which the switching operations were being performed.

5. Because the verdict and judgment are based wholly upon speculation and conjecture as to how the deceased met his death, and not on any facts from which legitimate inferences could be drawn.

ARGUMENT.

Inasmuch as a somewhat lengthy brief was presented to this Court on the application for a writ of certiorari, there is but little that can be said more than has already been said in that brief. All of the assignments of error can be considered under two heads. It is the contention of the petitioner:

First: That the negligent acts found by the jury in the original trial of this case were not shown to be the proximate cause of the death of Toops.

In other words, admitting that the Company was guilty of the acts found by the jury, and that those acts were negligent, yet there is no evidence that such negligent acts were the cause of Toops' death.

Second: It is the contention of petitioner that under the decisions of this Court and of the Federal Courts generally, the acts complained of and found by the jury were not negligent acts as a matter of law.

In our statement of facts it would seem as though the statement was a very brief one, and yet we think that this statement contains all the pertinent evidence as to the essential facts attending the death of Toops. Of course evidence was introduced on various collateral matters, but we think that our statement contains the really essential facts.

I.

There Was No Evidence to Show that the Negligent Acts Found by the Jury Were the Proximate Cause of the Death of Toops.

As a matter of fact, this action was brought on suspicion, tried without evidence, and determined on surmise. Taking

all of the evidence introduced at the trial, it seems clear to us that the plaintiff failed to show many essential facts which would be necessary to entitle her to go to the jury on the issues. Whatever minor discrepancies there may be in the testimony of the various witnesses for the respondent, several things stand out very clearly.

Toops was conductor in entire charge of the train and its movements. All of the other employes were acting under his direction and subject to his instructions. Although this was his first trip for several years over this line, yet he had formerly worked on this division and was familiar with the general layout.

No changes had taken place in the tracks and the surroundings in that part of the yards. He was provided with a good electric lantern. He knew what work was to be done in the yards and talked with his train crew about such work.

He himself assisted on the first part of the switching at Rolla. His work consisted of bringing cars from the side tracks and attaching them to the main train. He talked over with Brakeman Hemphill what should be done with reference to certain grain cars which were to be spotted on the elevator track and which had to be separated from some stock cars. The rest of the train crew started from the main track close to the station platform to attend to the placing of those grain and stock cars and Toops stayed upon the station platform, telling Hemphill, the brakeman, that he would look out for the grain cars. The crew of said train then picked up the

stock and grain cars, placed the stock cars, and were proceeding to place the grain cars on the elevator track.

During the time that they were so engaged no one saw Toops or his lantern, and nothing was seen of him by any member of the train crew until his body was found under the wheels of the engine tender at a point adjacent to the derail switch. This was not upon the main line but was upon one of the side tracks south of the main track. Where was Toops in the meanwhile? What was he doing when the grain cars ran over him? Which car struck him? How did he get to the place where the cars ran over him? If he did not see that the cars were being backed up or kicked in, why did he not see them? If he did see them, why did he permit himself to be struck and killed?

These are facts which constitute the very gist of the case, and yet on none of these matters is the slightest evidence given on behalf of the plaintiff. All of these questions are left to the conjecture of the jury and of the court as to how they should be answered.

In her petition, the respondent alleged that Conductor Toops, after having coupled the air upon the five grain cars, walked to the east end of the station and to a truck which was standing there, where he remained for a few minutes going through his order sheet. That after completing this work he went east approximately 325 feet along the main-line track and to a point north of the derail on the elevator track. That he was conductor and in charge of said train, and that as such conductor it was his duty to assist in spotting cars and switching trains. That his proper position was on the right hand,

or the engineer's side, of the train, which in this case was the south side; that it was necessary for him to go south and cross the elevator track in order to reach the south side of the train, and that he carefully, cautiously and while in the line of his duty, proceeded across said elevator track to a point three or four feet east of the derail on the track, with the intention of placing himself in a position to assist at setting the cars to the elevators thereon; that he was in the exercise of his duty in proceeding as above described; that the elevator track at this point was negligently constructed and in a dangerous condition. That the only light Conductor Toops had was the electric lantern and it was necessary for him to carefully watch his footsteps. That just as he stepped on said elevator track he was without warning struck by the west end of the fifteen moving grain cars which had been negligently, carelessly and recklessly kicked in onto the elevator track by the engine crew.

There you have plaintiff's theory of the case. In the evidence we have nothing except that Toops must have moved from the east end of the platform of the station to the point where he was killed. As to the other allegations there is absolutely no proof. What his movements were cannot be known and the trial court and the Supreme Court of Kansas, in approving the work of the jury, could not supply the lack of evidence to prove these very essential facts. The respondent alleged that Toops was struck by the west end of the fifteen moving grain cars. No evidence whatever supports this, but

all the evidence indicates he was struck by the second car, because plaintiff's witnesses and those of defendant all agree that there were no marks of blood on the rear car, but that on the second and other cars, up to the engine, marks of blood were found on the wheels, and defendant's witnesses without contradiction state that bits of flesh as well as blood were found on all wheels except those of the rear car (R. 41). This indicates that in some manner he got between the fourteenth and fifteenth cars, and was never struck by the fifteenth.

Of course, it is absolutely a matter of surmise as to how he came to be there between the first and second cars, but at least our surmise may be as plausible and as worthy of belief as that of plaintiff. It might readily be that Toops, having finished whatever work he had been doing, went forward to meet the string of cars that was to be pushed backward by the engine; that he attempted to get on the top of said cars to ride to the point where the cars were to be spotted and that he attempted this between the first and second car and that for some reason he slipped and fell between the two cars, and that he was then struck and killed by the second car from the rear.

The Supreme Court of Kansas, in the opinion written by Justice Hopkins, indicates that he could not have been attempting to get onto the cars because if he had been so doing his body would not have been found between the rails but would have been on the side of the track. This shows entire unfamiliarity with the structure and arrangement of the lad-

ders on box cars. On every box car there is a ladder at each end on the side of the car, and in addition to these ladders on the side of the car there are also ladders on the end of the car, right around the corner from the side ladders, and it might very readily be that Toops caught onto the side ladder and swung around to the ladder on the end for the purpose of reaching the top of the car; and this would thoroughly explain how it was that he may have fallen and his body might have been found between the rails. Of course, this is pure surmise, but it does not seem so improbable as the explanation given by the jury and approved by the trial court, and afterwards by the Supreme Court of Kansas.

In the course of the majority opinion written by Justice Hopkins of the Supreme Court, he makes use of the following language:

> "The deceased was not familiar with the elevator track. He approached it in the dark from the north for the first time in thirteen years. He is presumed to have been exercising due care and it may therefore be assumed that when he arrived at the track and attempted to cross it he listened for signals and heard none; that he looked for approaching cars with a light, and saw none, and that he stepped upon the defective track for the purpose of crossing over and instantly became aware that the kicked cars were upon him, but on account of the defective condition of the track it was impossible for him to escape; that in making an effort to escape he was knocked down, and as he fell forward his hat, lantern and pencil were propelled to the south side of the track. On account of the curve in the track his lighted lantern (which was thrown or fell out of his hand), could not be seen by the crew. The position of the body indicates that he was knocked down by the west end of the moving grain cars.

His train book, containing thirty-four or thirty-five bills, dropped into the center of the track, between the rails, and was lying two or three feet east of his body."

The various assumptions made by the Supreme Court *are* mere surmises, and are without any evidence whatever to support them. The statement made by Justice Hopkins corresponds very largely with the theory of the respondent in her pleadings and evidence. While it possibly might be true that these were the actual facts, yet this court cannot say, nor can any court, that these were necessarily the facts. Any other theory, equally plausible, would destroy the inferences that were made by the Supreme Court of Kansas. Take, for instance, the idea or theory that he was struck by the rear car in the train. He might have fallen, as suggested by the court, on account of the fact that there was very little dirt between the ties and a good many weeds and thistles. There is no evidence that they in any way interfered with his crossing over the track, if he were so doing. He may have been intending to cross over the track, if we find that he was really struck by the rear car, of which fact there is no evidence; or he may have stumbled over a rail instead of a tie or on account of being entangled in the weeds. No way has yet been discovered of operating a railroad without the use of rails, and one could just as easily fall over a rail as stumble on a tie that was insufficiently ballasted. One theory is just as plausible as another as to how he might have got under the train. In the opinion of Justice Hopkins he says:

"Inasmuch as he had come south to cross the track it is natural to conclude that when he was struck his

> pencil and lantern were thrown out and away from the track. His train book with the bills in it was found in the center of the track between the rails and east of his body, indicating that he was carrying the train book in his left hand at the time he was struck and dropped it in the center of the track. Had he attempted to climb on the train and fallen off, the train book would undoubtedly have been found in his pocket."

If such inferences can be made in the trial of a law suit, evidence would not seem to be a necessary part of the trial.

In another place in his opinion, the Supreme Court of Kansas says:

> "He did not know that they would come silently down upon him, without a white light on the leading car."

We desire particularly to call attention to the use of the word "silently." There is absolutely no evidence to show that the cars were moving silently. Such a thing as a silent movement of cars is hardly conceivable, and especially would this be the case where the cars were coming, as they were in this case, around a rather sharp curve. The friction of the wheels on the rails always produces a noise that can be heard from a great distance. Every time a car passes from one rail to another a distinct click can be heard. Whenever cars bump against each other in making up a train a noise is distinctly heard from the concussion through the entire length of train. The night was a dark night. This would undoubtedly interfere with vision, but certainly it would not interfere with hearing. The hour was a little after midnight and there would be nothing to interfere with the transmission of sound. As we have said, moving cars always make a sound and this is

especially perceptible in the late hours of the night. At that time one can hear in the city the approach of street cars and the movement of trains at a considerable distance from where one lies abed. We can only surmise, as the court below seems to have done, that Toops was unaware of the approach of the cars which ran over him. Of course, if Toops was aware of the approach of the cars, the absence of a brakeman and a lighted lantern on the rear of the approaching cars, or the failure of the engineer to give any signals, would make no difference. The object of these regulations, if there are such regulations, would be simply to apprise one of the presence and approach of the cars, and if he actually knew of this, there would be no occasion for signals.

The jury specially found that Toops had a good electric lantern, and then they made an additional finding; that Toops could not have seen the approaching cars by the aid of his lantern. There is not a syllable of evidence to support this finding. One of the objects in furnishing trainmen with a lantern is that they may be enabled to see approaching cars. Of course, they are also used for signals, but just as much to enable the one using them to go among cars without receiving injury. The rear brakeman, Hemphill, was also supplied with a good electric lantern and the front brakeman, Nolan, was supplied with an oil lantern. The conductor, Toops, Hemphill and Nolan, by the aid of these lanterns had assembled cars for switching, had made couplings, had changed switches, and had done all of the things ordinarily done in the operation of

switching. If the brakemen were able to do these things as indicated, it is impossible to see why Conductor Toops was not able to do the same. With the aid of his lantern, he had assisted in the movement of cars and in attaching them to the train on the main track at an earlier time in said night. To do this it was necessary for him to see the approach and movement of the cars he was to handle and the only way that he could see them, aside from the starlight, was by the aid of his lantern; and it is certainly presumptuous, in the absence of evidence, for the jury to say that Toops could not have done the same thing.

Admitting, however, for the sake of argument, that the jury was right in finding that Conductor Toops was not able to see the approaching cars by the aid of his lantern, then it would seem to us that the final analysis of the situation would be that the accident was due to the inefficiency of the lantern and Toops' consequent inability to see the cars approaching and possibly the surrounding situation as to tracks.

Toops used this lantern at least all the time after the train stopped at the station of Rolla. If the lantern was inefficient and was not able to do what a lantern is intended for and is expected to do, then no one was more aware of the inefficiency of the lantern than Toops himself. Toops, in using an ineffective agency, of which he must have had knowledge, would seem to us, under the rule laid down as to master and servant, to have assumed a risk of his employment, and therefore would not be entitled to recovery.

It is therefore seen that the three grounds of negligence found by the jury—the failure to protect the rear end of the grain cars, the failure of the engineer to give a signal when starting to back cars around the curve and through the cut, and the poor condition of the track at the derail switch—were not shown by the evidence to have had anything to do with the death of Toops.

In the opinion of Justice Hopkins he lays considerable stress upon a distinction which he finds between stations and railroad yards. He admits that petitioner's argument would be entirely correct and decisive if it applied to railroad yards. He quotes the rules of the company and definitions therein:

> "Station.—A place designated on the time table by name at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated."
>
> "Yard.—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time table, or by train order, may be made, subject to prescribed signals and regulations."
>
> "SEC. 102. When cars are pushed by an engine (except when shifting in making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need."
>
> "SEC. 24. When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

These last two rules, he says in effect, do not apply because the place where the accident occurred was not a yard but was a station. The confusion in his mind, in our opinion,

seems to have arisen from the fact that stations and yards are defined separately. Certainly the definition of "yard" as quoted above covers the situation at Rolla. There was a place for the making up of trains, storing of cars and other purposes and movements not authorized by the time table or by train orders might be made there. It seems to us that the trouble arises from the idea that the rules of the railroad classify stations on its tracks; that is, that it calls some of them "stations" and calls others "yards." There seems to be no basis in the testimony nor in fact for such a classification.

In performing switching operations, the fact that the yards might also be at a station, it would seem to us, would make absolutely no difference. The rules do not seem to attempt to distinguish stations from yards.

There is nothing to prevent having yards at stations; in fact, almost every station has switches, sidetracks and yards in which to do switching, storing of cars, and other matters incident to the operation of a railroad. The station, as a station, has one purpose, principally the control of trains by telegraphic orders; the yards have another; and it seems rather forced to say, as the court in Kansas does say, that Rolla is a station, and not a yard, and therefore not covered by the rule with reference to switching, regardless of the purpose for which the tracks are used. Whether the yards be large or small, the rule with reference to protecting the other members of the switching crew from injury would probably be the same. It is a matter of construction of the

definition and certainly the definition of "yards" would cover the station at Rolla. If there is any ambiguity about the rule, the practical construction placed upon it by trainmen, as shown by the evidence, was that it was not the custom in handling and switching cars at stations to observe the rule which might be applied to "stations," and not the rule as to "yards." That is, it was not the custom to have a lighted lantern on the rear of the car, or brakeman located there, except where the switching was going on over a highway crossing. It is true that there was a highway crossing over the station grounds at Rolla, but it was several hundred feet west of the place where the accident occurred.

A common-sense definition of the word "yards" is to be found in *George v. Quincy, O., & K. C. R. Co.*, 139 Mo. Ct. Ap. 283. The matter is summed up in the first paragraph of the syllabus:

> "Rev. St. 1909, Sec. 3163, requires railroads to block all switches, frogs, and guard rails 'in all yards, divisional and terminal stations, and where trains are made up.' HELD, that the word 'yards' was not limited to yards maintained at divisional or terminal stations, or where many parallel tracks are maintained, and cars habitually switched, but included a way station at which there was a system of tracks where cars could be cut out of a train and stored, loaded or unloaded, or delivered to connecting lines, and where switching was customarily or habitually, though not constantly, carried on."

In the course of the opinion in the George case, Justice Trimble uses the following language:

> "Everyone knows that every railroad station has a 'yard' of its own, by which is meant a place or piece of

> ground, usually within certain reasonable limits, though not necessarily inclosed, surrounding the depot or station, and used to switch and stand cars therein for the purpose of loading or unloading freight handled at that point, and for other purposes connected with the railroad business transacted at such station. Such place, in ordinary language, used by the persons in charge of such stations, as well as by the public doing business thereat, is termed a 'yard.' And in it there is always more or less switching to be done in order to deliver and take away cars at said station. . . ." (p. 154.)

The following principles applicable to cases arising under the Federal Employers' Liability Act have been enunciated by the Supreme Court of the United States.

In case of accident to an employe, he must prove not only the cause which operated to produce the injury, but also some negligent act or omission of the employer in which the cause of injury originated. The fact of accident does not warrant an inference of negligence. Negligence is an affirmative fact which must be established by evidence. When the evidence leaves a cause of injury in doubt, and any one of several things may have been the cause, the jury may not choose one of them by guess, and find negligence without a satisfactory basis for the conclusion. With the presumption that the injured employe used due care goes the correlative presumption that the employer used due care. This presumption must be overcome by evidence. When circumstantial evidence is relied on to prove a fact, the circumstances must be proved. The circumstances must not themselves be presumed, and one presumption cannot be built upon another.

Patton v. Texas and Pacific Ry. Co., 179 U. S. 658.

Looney v. Metropolitan R. R. Co., 200 U. S. 480.

Chi., Rock Island & Pac. Ry. v. Bond, 240 U. S. 449.

New Orleans & N. E R. R. Co. v. Harris, 247 U. S. 367, 371.

C., M. & St. P. Ry. v. Coogan, 271 U. S. 472.

In the Patton case, in the syllabus, it is said:

> "The fact of accident carries with it no presumption of negligence on the part of the employer, and it is an affirmative fact for the injured employe to establish, that the employer has been guilty of negligence: . . . in the latter case, it is not sufficient for the employe to show that the employer may have been guilty of negligence, but the evidence must point to the fact that he was; and where the testimony leaves the matter uncertain, and shows that any one of half a dozen things may have brought about the injury, for some of which the employer is responsible, and for some of which he is not, it is not for the jury to guess between these half a dozen causes, and find that the negligence of the employer was the real cause when there is no satisfactory foundation in the testimony for that conclusion."

In the Looney case, it is held that in an action for damages for personal injuries, while the defendant has the burden of proof of contributory negligence, the plaintiff must establish the grounds of defendant's liability; and to hold a master responsible a servant must show by substantive proof that the appliances furnished were defective, and knowledge of the defect or some omission in regard thereto. Negligence of defendant will not be inferred from the mere fact that the injury occurred, or from the presumption of care on the part

of the plaintiff. There is equally a presumption that the defendant performed his duty.

In the Harris case, it is held that rights and obligations under the Federal Employers' Liability Act depend upon it, and the principles of the common law, and negligence is essential to recovery. In the course of the opinion the court says:

> "The federal courts have long held that where suit is brought against a railroad for injuries to an employe resulting from its negligence, such negligence is an affirmative fact which plaintiff must establish. . . ."

The Coogan case is the one particular case upon which petitioner relied in the trial of this case before the jury and also in its contention before the Supreme Court of Kansas. In that case at the close of the evidence the petitioner moved the court to direct a verdict in its favor on the ground, among others, that respondent had failed to prove any actionable negligence on the part of the petitioner, and that any verdict for respondent would be based upon speculation and conjecture, and in the decision this contention on the part of the petitioner was sustained.

Again, the court holds that the rights and obligations of the petitioner depend upon the Employers' Liability Act and applicable principles of common law as interpreted by the Federal courts; that the Supreme Court should examine the record and if it is found that, as a matter of law, the evidence is not sufficient to sustain the finding, and that the carrier's negligence was not the cause of the death, judgment should be reversed. The contention of the respondent was

that a stretch of pipe line about fifteen feet in length had been loosened and bent three or four inches toward the rail, and that this condition of affairs had lasted for some months. The court says:

> "The evidence is sufficient to warrant a finding that there was a breach of duty in this respect. But the precise question for decision is whether the condition of the pipe caused or contributed to cause the death of deceased. . . . "

and the court held that there was not sufficient evidence connecting the injury with the negligence so found. Quoting from the decision, the court says:

> "It follows that, unless the evidence is sufficient to warrant a finding that the death resulted from the catching of deceased's left foot under the bent part of the pipe line, the judgment cannot be sustained. As there is no direct evidence, it is necessary to determine whether the circumstances are sufficient to warrant a finding of that fact. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. . . . There is nothing to show that the pipe had any connection with the accident. The fact that deceased was run over and killed at the time and place disclosed has no tendency to show that his foot was caught. One between cars coupling the air hose is very liable to be run over if the train is unexpectedly moved. A finding that his foot was not caught under the pipe is quite as consistent with the evidence as a finding that it was.
>
> "It is the duty of the trial judge to direct a verdict for one of the parties when the testimony and all the inferences which the jury reasonably may draw therefrom would be insufficient to support a different finding. . . . When the evidence and the conclusions which a jury might fairly draw from the evidence are taken most strongly against the petitioner, the contention of re-

spondent that the bent pipe caused or contributed to cause the death is without any substantial support. The record leaves the matter in the realm of speculation and conjecture."

Giving the foregoing decisions and others their full force and effect, it would seem to us that upon this branch of the case there must be a holding that even if the so-called acts of negligence had been proven, yet in the absence of proof that the injury was due to any one of the so-called acts of negligence the decision must be in favor of the petitioner.

II.

Under the Decisions of this Court and of the Federal Courts Generally, the Negligent Acts Complained of and Found by the Jury were not Negligent Acts as a Matter of Law.

But there is on the other branch of the case a very serious question whether the negligence found by the jury in answer to special question No. 10 would constitute actionable negligence. Question No. 10 submitted to the jury was as follows:

> State fully in what the negligence of the defendant consisted, if any.
>
> Answer First. In not protecting the rear end of the fifteen grain cars.
>
> Second. In engineer not sounding signal when starting to back cars around curve and through cut.
>
> Third. Poor condition of track at derail switch.

The second ground of negligence, that the engineer did not sound signal when starting to back cars around curve and

through cut, has no evidence to support it so far as "through cut" is concerned. It is true that the engineer was sending the cars around a curve, but, as to the "cut," the evidence shows that on the south side of the track the ground was higher, possibly six or eight feet higher, but not that there was a cut there, and the north side of the track was the natural surface of the ground, the same as the rest of the yards, and a person looking from east of the depot toward the track would not have his view impeded by anything on the north side of the track. This will be plainly seen in the photograph, attached to the transcript of the record.

In the very recent case of *Kansas City Southern Railway Company v. Jones*, 276 U. S. 303, the court says:

> "No one saw the death, but the body was found between the main track and a parallel track and the probability is that Ferguson was killed by a train going north on the former. A freight train was being made up on the parallel track, and the hypothesis of the respondent, supported by little if anything except the place where the body and the lantern of the deceased were found, is that Ferguson was engaged in inspecting the cars, and so absorbed in his work that he did not hear the approaching train but was relying upon the ringing of the engine bell, which usually was rung but which the respondent's witnesses say was not rung on this occasion. The court below sustained the verdict on this ground. Ferguson was seen not later than a quarter before seven in the evening, so far as the time can be fixed. The train passed at five minutes after seven, the time at which it was known by him to be due. His body was found at twenty-five minutes after seven. He was an experienced man. The indications are that there was nothing for him to inspect at the probable time of his death. At best it is a mere guess that he was so engaged, still more that he was absorbed

in such work. The main track was straight and the train was making a great noise and showing a bright light as it approached. Nothing except imagination and sympathy warranted a finding that the death was due to the negligence of the petitioner rather than to that of the man himself. . . . "

The latest expression of the Supreme Court of the United States is to be found in the case of *Toledo, St. Louis & Western R. R. Co. v. Allen*, 276 U. S. 165, and inasmuch as all of the principles involved in actions like the present one are somewhat fully discussed, we quote quite freely from this case:

"October 27, 1922, petitioner's railway system was being operated by a receiver as a common carrier of interstate commerce. Respondent was a car checker in the service of the receiver; and, while employed in such commerce in petitioner's railroad yard at Madison, Illinois, he was struck and injured by a shunted car. He brought this action in the Circuit Court of Saint Louis, Missouri, claiming damages under the Employers' Liability Act, U. S. C., Tit. 45, c. 2, Section 51. . . .

"The yard where plaintiff was injured included a lead track, and connected with it, a number of parallel switch tracks, the centers of which were about twelve feet apart. Plaintiff had been regularly employed there as a car checker for about eighteen months, and his hours were from 11 in the evening to 7 in the morning. His work required him to be in the yard while switching was being done and to go from place to place to check and list cars that had been switched and arranged on various tracks for the purpose of making up trains.

"At the time of the accident he was checking a string of cars that had been placed on Track 5, and was between it and Track 4, about 125 yards from the lead. A switching crew was at work in the yard. The engine was on the lead attached to from twenty to twenty-five cars that were between it and Switch 4. Two cinder cars were

detached from the end while the string of cars was being pushed by the engine.

"They were shunted by means of the switch to Track 4, and by their momentum moved to the place where plaintiff was struck. The yard was not artificially lighted. It was an ordinary starlight night, without moon. The shunted cars moved at moderate speed—four to six miles per hour—and made noise enough to be heard at a distance of one or two car lengths. They were unlighted and unattended, and no person warned plaintiff of their approach.

"The Act of Congress under which plaintiff seeks recovery took possession of the field of liability of carriers by railway for injuries sustained by their employes while engaged in interstate commerce, and superseded state laws upon that subject. *Second Employers' Liability Cases*, 223 U. S. 1, 55. This case is governed by that act and the principles of the common law as applied in the courts of the United States. The plaintiff can not recover in the absence of negligence on the part of defendant. *Seaboard Air Line v. Horton*, 223 U. S. 42, 502.

"And, except as specified in Section 4 of the Act, the employe assumes the ordinary risks of his employment, and when obvious or fully known and appreciated by him, the extraordinary risks and those due to negligence of his employer and fellow employes. *Boldt v. Pennsylvania R. R. Co.*, 245 U. S. 441; *Ches. & Ohio Ry. v. Nixon*, 271 U. S. 218. If, upon examination of the record, it is found that as a matter of law the evidence is not sufficient to sustain the essential findings of fact, the judgment will be reversed. *C. M. & St. P. Ry. Co. v. Coogan*, 271 U. S. 472, 474. . . .

"Defendant did not owe to plaintiff as high a degree of care as that due from carriers to their passengers or others coming on their premises for the transaction of business. The reason for the distinction is that plaintiff's knowledge of the situation and the dangers existing because of the narrow space between the tracks was at least equal to that chargeable against the defendant. *Missouri Pacific*

Railroad Co. v. Aeby, 275 U. S. 426; 48 Sup. Ct. R. 177. The rule of law which holds the employer to ordinary care to provide his employes a reasonably safe place in which to work did not impose upon defendant an obligation to adopt a rule for the spacing or construction of its tracks and yards. *Baltimore & Ohio R. R. Co. v. Groeger*, 266 U. S. 521, 529.

"Carriers like other employers, have much freedom of choice in providing facilities and places for the use of their employes. Courts will not prescribe the space to be maintained between tracks in switching yards, nor leave such engineering questions to the uncertain and varying opinions of juries. *Tuttle v. Milwaukee Railway*, 122 U. S. 189, 194; *Randall v. Baltimore & Ohio R. R. Co.*, 109 U. S. 478, 482; *Washington, etc., Railroad Co. v. McDade*, 135 U. S. 554, 570. . . .

"And the Court authorized the jury to find the defendant negligent in failing to cause the engine bell to be rung and in sending the cars along Track 4 without a light and unattended. The opinion below declares that the starting or running of the switch engine without ringing a bell or blowing a whistle was evidence of negligence; and that if, according to the practice, cars could be shunted dangerously near to the place where plaintiff was working, without any warning to him or knowledge of such custom or practice on his part, the system of doing the work was not reasonably safe and plaintiff was not provided with a reasonably safe place in which to work and did not assume the risk.

"Obviously the ringing of the bell when and after the cinder cars were uncoupled or when the engine started or while it was running would not have been useful as a warning to plaintiff. When the cars were detached, he was from three to four hundred feet from the lead track and the engine was at the other end of the string of cars. The decision on this point is contrary to the rule followed in the Federal Courts. *Aerkfetz v. Humphreys*, 145 U. S. 418, was a case presenting a situation similar to that here involved. It is there said (p. 420): 'The ringing of

bells and the sounding of whistles on trains moving forwards and backwards, would have simply tended to confusion.' And see *Rosney v. Erie R. Co.*, 135 Fed. 311, 315; *Connelley v. Pennsylvania R. R. Co.*, 201 Fed. 54, 57.

"And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard. On the evidence it must be held that he knew how switching was done there; and, in the absence of proof that he was exposed to some unusual danger by reason of a departure from the practice generally followed, it can not be held that defendant was in duty bound to give him warning. The members of the switching crew had a right to believe that he would keep out of the way of the shunted car. *Aerkfetz v. Humphreys, supra.*

"In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him. *Boldt v. Pennsylvania R. R. Co., supra; Ches. & Ohio Ry. v. Nixon, supra; Randall v. Baltimore & Ohio R. R. Co., supra; Tuttle v. Milwaukee Railway Co., supra.*

. . .

"There is no claim that he was not about his work in the usual way or that he could not have avoided the cars if he had known they were coming. A slight movement on his part would have been enough. When the engine pushed the string westerly along the lead to give the cinder cars momentum, the field man was on the south side of the lead and turned switch 4 to shunt them on that track. There is no evidence that he saw plaintiff or knew where he was while the switching movement was being made.

"The foreman of the crew was on the north side near the westerly end of the string of cars. He lifted the coupling pin to detach the cinder cars and gave signals for the starting and stopping of the engine in order to

give them the desired impulse. He saw the lantern carried by plaintiff on the north side of the cars on track 5 and assumed that plaintiff was at work there. Plaintiff's son was the other switchman. He was on the north side near the middle of the string of cars and received from the foreman and transmitted to the engineer the signals for the starting and stopping of the engine. He also saw plaintiff's lantern. Neither engineer nor foreman knew where plaintiff was.

"The mere fact that the foreman and plaintiff's son saw the lantern and knew that plaintiff was checking cars on track 5 is not sufficient. There is nothing to sustain a finding that plaintiff was in any danger other than such as was usually incident to his employment or that any member of the crew knew or had any reason to believe that he was oblivious of the situation. *Illinois Central Railroad Co. v. Ackerman*, 144 Fed. 959, 962.

"In the absence of knowledge on their part that he was in a place where he was liable to be struck and oblivious of that danger, they were not required to vary the switching practice customarily followed in that yard, or to warn or to take other steps to protect him."

In *Elliott on Railroads*, Vol. 3, Second Edition, paragraph 1258, it is said:

"Even as to employes the company is under no obligation to ring the bell or sound the whistle upon a switching engine engaged in making up trains in its yards, for the purpose of notifying such employes, who are familiar with the operation of the yard."

We can but think that the feeling of the writer of the opinion of the Supreme Court of Kansas had more or less to do with the decision of that Court. In the course of his opinion (R. 84), he says: "The main contention of the defendant is that there was no *prima facie* case for a jury, a contention we can not sustain. This is not one of those cases

where we can say as a cold-blooded matter of law that there was no negligence and no liability."

We desire to call attention to the recent case of *Burnett v. Penn. R. Co.*, 33 Fed. (2d) 579, 580, where the court says:

> "Even if it might be thought that plaintiff's proofs were consistent with the existence of a brake defect as the cause of this accident, they were at least equally consistent with the existence of some other effective cause. In such case there is no question for the jury." (Citing cases.)

Our own Supreme Court of Kansas apparently does not feel too confident of the law. In the case of *Caples, Admrx. v. A. T. & S. F. Ry. Co.*, from the opinion handed down December 7, 1929, and not yet officially published, we quote three paragraphs of the syllabus.

> "2. An experienced employe familiar with the yard and with the continuous operation of switching cars therein without lights or lookouts on the ends of cars, is required to take precautions for his own safety and has no right to expect the protection of the railroad company that should be exercised towards passengers or others who may have come on their premises for the transaction of business.
>
> "3. Familiar as the car checker was with the yard and the switching of cars there in the customary way, he had no right to expect that there would be lights or lookouts on the switching cars or that other warnings of approach would be given.
>
> "4. Those in charge of the switching operation had a right to believe that the car checker as well as other employes with the knowledge of the yard and the switching of cars therein, would take precautions for their own safety in the ordinary switching operations and would not rely on warnings to be given by those in charge of the switching movements."

The analysis of the situation in the dissenting opinion of Justice Burch seems to us to be a clear and accurate statement of the situation, and we quote from the same (R. 85-93):

> BURCH, J. (dissenting): The action was based on the federal employers' liability act. The case is governed by federal law. The judgment must stand up, if at all, under the decisions and the method of review of the Supreme Court of the United States. The opinion of this court makes no reference to decisions of the Federal Supreme Court touching any phase of the case except the subject of assumption of risk, which I do not regard as important. If I read the federal decisions correctly, the judgment of the district court should be reversed.
>
> The jury found defendant was negligent in not protecting the rear end of the fifteen grain cars. The opinion of the court approves the finding because neither brakeman nor white light was on the west end of the grain cars, and Conductor Toops had a right under the rules to believe and rely on the fact that one of his brakeman would ride the kicked-in grain cars, the brakeman taking a position on the west end of the first car, where his light could be distinctly seen. The rules supposedly creating this duty were rules 24 and 102.
>
> Conductor Toops knew perfectly well that no brakeman with a light would be on the end grain car to show him the string of grain cars was coming, because he planned the work so his brakemen would of necessity be otherwise employed, and in planning the work he was the company.
>
> The first work done was to get five loaded grain cars from the elevator track and put them into the train. Toops made the air coupling. The train was then made up, but there was switching to do. Toops and his two brakemen went over the switch list. The instructions were to get fifteen empty grain cars, which were behind twelve stock cars, off the passing track and place the grain cars at the elevators for loading. The head brakeman went east with the engine to open and close switches and make the engine couplings. The rear brakeman

stayed behind to make the coupling of cars back at the road crossing. This done, the engine, stock cars and grain cars all went eastward, and both brakemen went with them. The grain cars were to be kicked in on the elevator track, the stock cars were to be replaced on the passing track, and the engine was then to be attached to the east end of the string of grain cars in order to push them to the elevators. The head brakeman's duties did not contemplate that he should leave the engine standing idle, get on the rear grain car, ride it back to show Toops the string of grain cars was coming, and then walk back, to throw the switches so the stock cars could be replaced, and after that the engine could be attached to the grain cars. The rear brakeman was obliged to take care of the stock cars after they were kicked back on the passing track, and he could not get on the rear grain car and ride it back to show Toops the string of grain cars was coming, without holding up the work. Toops had but two brakemen. The train was to be put over the road that night, and it would have been the essence of nonsense for Toops to take either brakeman from his proper employment and assign to him the duty of riding the rear car of the string of grain cars, lantern in hand, back to where Toops was waiting for them, just to show Toops they were coming. That practical application of the rules required no such absurdity was disclosed by the following testimony for the plaintiff:

"And while Mr. McHenry was bringing the engine through the stock track, I was standing at the crossing on the north side of the main line, talking to Mr. Toops; he was on the south side of the main line, and he asked me if these fifteen cars were all in one cut, and I told him they were, and that I would kick them into the elevator track. He said, 'All right, I will look out for them'."

Toops knew perfectly well that neither of his brakemen carried two lanterns, one to work with and the other to be put on the rear end of the string of cars to show Toops they were coming. Of course there was no need of a light to protect the public crossing west of the sta-

tion, because Toops was on guard looking out for the cars some 300 feet east of the station.

It was not Toops' duty merely to assist in the switching operations. Rule 396 required him to attend personally to the switching, since he had no unloaded way freight to check. He was in full charge of the switching operations, not theoretically, as a matter of rule, but as a matter of fact. One of plaintiff's witnesses testified:

"If he tells me to do something as a brakeman, it is my duty to do it; and if he tells Hemphill to do something, it is Hemphill's duty to do that; and if he tells the engineer to do something, it is the engineer's duty to do it. The conductor has entire charge of the switching operations, and the others simply work under him."

The result is, protection of the rear end of the fifteen grain cars goes out of the case as a basis of recovery, because the company was not negligent toward Toops in that regard.

The second ground of negligence found by the jury was failure of the engineer to give a signal when starting to back the cars. What was the purpose of such a signal? Manifestly, the purpose was to apprise a person who might not anticipate a backward movement of the train that such a movement was about to begin, and would result in sending cars in on the elevator track.

At the time the signal should have been given the end of the string of grain cars was east of the junction of the elevator track with the main track, the stock cars were east of the grain cars, and the engine was at the east end of the string of stock cars. The curve and the embankment intervened between the end car of the string of grain cars and the place Toops chose to meet it. A sounded signal would be far away. Time would elapse before the end car would reach Toops and, signal or no signal, he would necessarily be obliged to be on the lookout for approach of the expected cars. So rule 483 applied to Toops. That rule required him to be vigilant and cautious, and not trust alone to signal or rule of safety. He had sent the engine and brakeman eastward for the express purpose of kicking the grain cars upon the ele-

vator track. They were certain to arrive after sufficient time to complete the preliminary operations and then perform the kicking operation. There was in fact delay. The engineer gave the cars a kick, and stopped. The slack ran out, and it was discovered the grain cars were not detached. New signals were given, a second kick was made, and the grain cars were cut off. In anticipation of their approach, Toops went to a proper place to meet them. When the end car approached him it was moving slowly, because inertia very soon brought it to rest, and the presumption is Toops was vigilant and cautious, and watched carefully for approach of the very cars he went to the switch track to meet.

The jury found that Toops had a good lantern, but the jury found he could not see the cars with it (finding No. 7). The two brakemen had no difficulty in finding cars and switch stands and safely making couplings with their lanterns, one of which was like the one Toops carried. Toops said he would look out for the grain cars. As indicated, he knew there would be no brakeman with a lantern and no white light to show him the end car of the fifteen grain cars. Signal or no signal, he had to find the grain cars with his lantern. He knew and the jury knew he was equipped to do so, and the seventh finding of the jury would be ludicrous if the subject to which it relates were not so serious. The court's opinion properly indulges the presumption that when Toops arrived at the switch track he looked for the approaching grain cars, but the court's hypothesis that he did not see the end of the grain car which immediately struck him is quite as unsupported by evidence as the jury's finding.

Under federal law the employer must not only be negligent, but the proof must show that the negligence caused the injury. (*St. L. & Iron Mtn. Ry. v. McWhirter*, 229 U. S. 265, 281; *C. M. & St. P. Ry. v. Coogan*, 271 U. S. 472, 478.) In this instance there is no evidence that failure of the engineer to give a signal before he kicked the grain cars upon the elevator track had anything to do with the accident.

The third element of defendant's negligence found by the jury was the poor condition of the track. A photo-

graph of the track taken the day after the accident is in the record. The question fairly arises whether the jury was competent to declare defendant negligent in providing the kind of track disclosed by the photograph and the testimony, and whether Toops did not assume the risk of using skeletonized elevator tracks at small stations on the Dodge City-Elkhart branch line; but waiving this matter, there was no evidence the condition of the track had anything to do with Toops' death.

Nolan said he was slow about making the cut for the first kick because of the condition of the track—bad footing. The conclusion that Toops was killed because of bad track is on a par with the reasoning of a witness for plaintiff. The witness opined the accident might have been caused, not by lack of ballast, nor by weeds, nor by skeletonized track, but because of a spike not fully driven down. The witness testified:

"He could have caught his foot on a spike. There is a spike sticking in there just close to where he laid on the inside of the rail. . . . I didn't see anything to indicate that he fell on a spike, but he was there, and the spike was there."

All the proof there is in the record that the condition of the track caused the accident is that the track was bad and the man was found dead upon it. To conclude the condition of the track caused the accident involves a spurious use of the *res ipsa loquitur* doctrine instead of speculation, in determining cause, a method specifically condemned by the Supreme Court of the United States in an opinion published April 15, 1929. (*Louisville & Nashville Railroad Co. v. Chatters*, Advance Opinion No. 414, p. 8.)

The court's explanation of the accident is as speculative as it is schematic. It is assumed without evidence that Toops did not reach the place of the accident until just as the rear grain car arrived. Under this assumption Toops would have run into the side of the string of grain cars but for the failure of the first kick of the engine to send them in on the elevator track. To the first assumption

is added another, having no basis in the evidence, namely, that Toops stepped on the track in front of the moving end car, which he looked for and could not see, on his watchful way to the south side of the elevator track. Then follow assumption after assumption, until the fanciful account of the accident is complete. The end of the first car struck Toops; his agility was handicapped by the skeletonized track, his feet were trapped, and he was knocked down; he threw his lantern and pencil to a place beside the track, with his right hand; he dropped his train book, which he held in his left hand, between the rails; then with his hands free, he was helpless, and suffered fatal mutilation. Attorneys for plaintiff go so far as to give us the workings of his mind while facing his doom. They say he threw his lantern to the side of the track for an emergency signal, which nobody could see, and the court does not relinquish the view that Toops actually threw his lantern into the weeds beside the track.

It will be recalled that Toops' hat was found beside the track with the lantern and pencil. Did he throw his hat there as he did the lantern and pencil? If so, with which hand? Or did the hat fall there, and if it did, why may not the lantern and pencil have fallen there?

The lantern was from three to four feet south of the south rail of the track. The hat was nearer the rail, and the pencil still nearer. Conceive of a yardstick poked under the overhang of a large-size grain car, with one end against the rail. The other end of it would be in the midst of the articles mentioned, and it is just as reasonable to assume that the articles fell at the side of the car as that they were thrown from a place on the track at the end of the car by a man suddenly knocked down.

The court says that if Toops had been on the car and had fallen down, his train book would have been in his pocket. One easy guess is that maybe the train book was in a pocket when the terrible encounter commenced which ended with the headless body jammed against the derail.

The court says that if Toops had attempted to climb on the moving cars and had fallen, he would naturally

have fallen outside the rails. I am not familiar with the law of nature which would prevent him from falling partly outside the rails and partly between the rails.

At some time Toops left the station platform, where he was last seen, and went to the switch track, where he was killed. He was in the midst of unfamiliar surroundings. The night was very dark, and after traveling about 100 yards, he was to approach the elevator track for the first time in thirteen years. Just why he should carry his pencil in his lantern hand, and his trainbook with thirty-four or thirty-five bills in it in his left hand, to meet a cut of kick-in cars which he was to take care of, has never been explained. Book and pencil in separate hands could not help him find the way, or find the cars on the switch track, or be of use to him when he reached the switch track, or be of use to him when he began to do what was necessary to take care of the cars. The articles might be a hindrance to him in doing his work, something which an experienced and prudent man would guard against. A common sense view would be that when he was ready to go he stuck his pencil under his hat the way conductors do, put his billbook in his pocket, took his lantern in the hand he used by force of habit, and proceeded to the place where he had planned to be. Anyway, there would have been nothing fantastical about this kind of conduct, and if he did conduct himself in that manner, it requires no more invention to explain what followed than appears in the court's opinion.

To render the court's theory of the accident tenable, it is indispensible that Toops should have been struck by the west end of the west grain car, knocked down and then killed. The theory has been that he was killed practically as soon as he was knocked down. Some physical facts rationally considered refute the theory. Plaintiff's witnesses testified there was no blood on any of the four south wheels of the west car, and that there was blood on the south wheels of all other grain cars. In plaintiff's brief it is said that, "blood was found on all of the cars except the first car on the west end of the string of fifteen cars."

The jury's evasive answer to the third interrogatory discloses the candor which it displayed in disposing of the case. A witness who examined the car wheels both the night of the accident and the next morning testified there was flesh as well as blood on the wheels, and nobody corrected or contradicted him. His testimony is important, and follows:

"We examined the trucks of the freight cars that night, and then made another examination the next morning. We found no marks of blood on the first car. The first marks of blood we found on them were on the west end, west wheel, on the south side of the second car. Following these cars up to the engine, we found blood on every wheel, blood and flesh on every wheel up to the tender, up to and including the tender.

"I crawled under the cars the next day, just under the first two. I made this examination at the request of Mr. Shull, the claim agent of the Santa Fe, and Doc Ellis. It was made in the morning. Doctor Ellis was the doctor that was called before we moved the body, before anybody would touch it. The doctor requested that we look the ground over thoroughly, because we would all be called, and that we would more than likely be called on the coroner's jury."

To prevent the jury from drawing from the physical facts the natural and inevitable inference that Toops was killed by the first wheel of the second grain car, plaintiff produced a physician who gave the following testimony:

"In a crushing injury where a railroad car wheel or railroad engine mashes off a member, it mashes up the tissues so bad, including the blood vessels, that there isn't any bleeding immediately following it, like there would be if it was cut off with a sharp instrument."

When Toops was killed the grain cars were moving so slowly they stopped within a short distance. The head brakeman testified as follows:

"To the best of my judgment, the west end of those fifteen cars was about three or four car lengths west of the derail."

This testimony must be true, because the evidence was uncontradicted that the east car of the string of grain cars stopped within two or three car lengths of the elevator track switch, and the sketch, drawn to scale, submitted as illustrative of the station grounds, indicates the string would not be long enough to reach five car lengths beyond the derail.

It is a matter of common knowledge that the head is supplied with blood by large arteries ascending on each side of the neck, that the blood is returned by large veins, and that arteries and veins have branches and ramifications supplying the various tissues. Toops' head was severed, and his right arm was mangled and severed. To do this it was necessary that the car wheel pass through arterial and venous blood. The physician would make of a car wheel and a steel rail such deft instruments that crushed major arteries and veins in crushed tissues would be sealed up so that no blood could escape—immediately. The doctor's testimony did not cover the subject of crushed tissue adhering to the wheel that crushed it. We have then this operation: The first car wheel does its dexterous work. The car moves on five or six feet—whatever the distance between the wheels of the front truck. The second wheel of the front truck comes through clean because the blood cannot start to flow. The car rolls slowly on some twenty-five feet—or whatever the distance between the trucks of a 40-foot grain car. The first wheel of the rear truck passes over the place of severance. Still no bleeding. The car moves on, and the last wheel of the car comes in contact with no blood. The car rolls on for the distance between the rear wheel of the front car and the front wheel of the second car. Then is the time for bleeding to commence and flesh to adhere, and they do so.

In cases of this character the Supreme Court of the United States examines the record, determines for itself what is substantial and what is unsubstantial testimony, and does not permit a jury question to be raised by unsubstantial testimony. (*Gulf, etc., R. R. v. Wells*, 275 U. S. 455). I fear the Supreme Court of the United

States would not regard the physician's testimony as making a substantial contribution to the solution of the case.

Since the theory that the first car killed Toops forces the facts, the court falls back on the second car. Toops comes down to the switch track, and fortuitously steps on the track just as the west end of the first car reaches the exact locality. The west end of the first car strikes him, and he makes distribution in space of lantern, pencil, hat and train book. He is knocked down, but all the first car does is to push him maybe two or three feet, possibly roll him some. The second car then comes along and kills him. Besides nullifying the court's approval of the doctor's testimony regarding postponed exudation of blood, this will be a great surprise to plaintiff's attorneys.

The petition alleged that Toops was struck by the kicked-in cars, was knocked to the ground between the rails at a point three or four feet (two or three feet) east of the derail, and his body dragged until his shoulders rested against the derail. The petition then stated:

"That his head and right arm had fallen in such manner that they lay across the south rail of the elevator track and were severed from his body by the wheels of the rear car of said kicked-in cars; . . . "

The brief for plaintiff contains the following, printed in italics: "The petition contains our theory of the case, and the evidence amply sustains our theory."

The brief does depart a little from the petition. The petition states that Toops was knocked down, that his body was dragged, but that his head and arm had "fallen" so they were severed. The brief says:

"His head fell over the south rail, as did his arm. We are not clear as to whether the front wheels severed his head and arm, or whether it was the rear wheels of the first car."

There was evidence the body was dragged westward a little way, and that the severed arm lay about three feet

west of the severed head. There is not even a scintilla of evidence that the first car did the dragging. Finding the court's conjecture respecting a vital matter at odds with the conjecture upon which plaintiff commenced, tried and won the case, I am content to close with the observation that the decisions of the Supreme Court of the United States forbidding a jury to speculate on cause of accident are so numerous citation of them is superfluous.

The reasoning of Mr. Justice Burch in the dissenting opinion in our judgment wholly demolishes the reasoning of Mr. Justice Hopkins in the majority opinion.

Every point is considered by Mr. Justice Burch and no more persuasive brief or argument can be made on behalf of the petitioner than is contained in this opinion.

We respectfully pray that the judgment of the Kansas Supreme Court may be reversed.

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OWEN J. WOOD,
ALFRED A. SCOTT,
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All of Topeka, Kansas,
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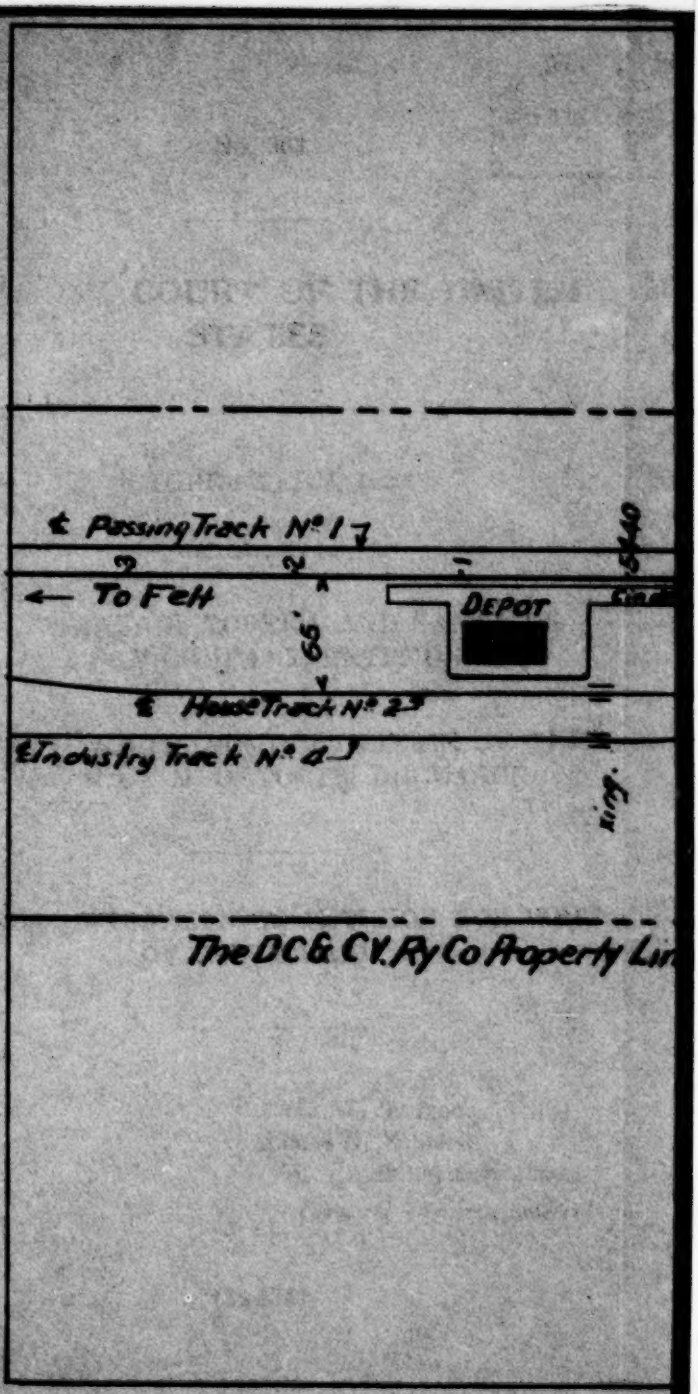
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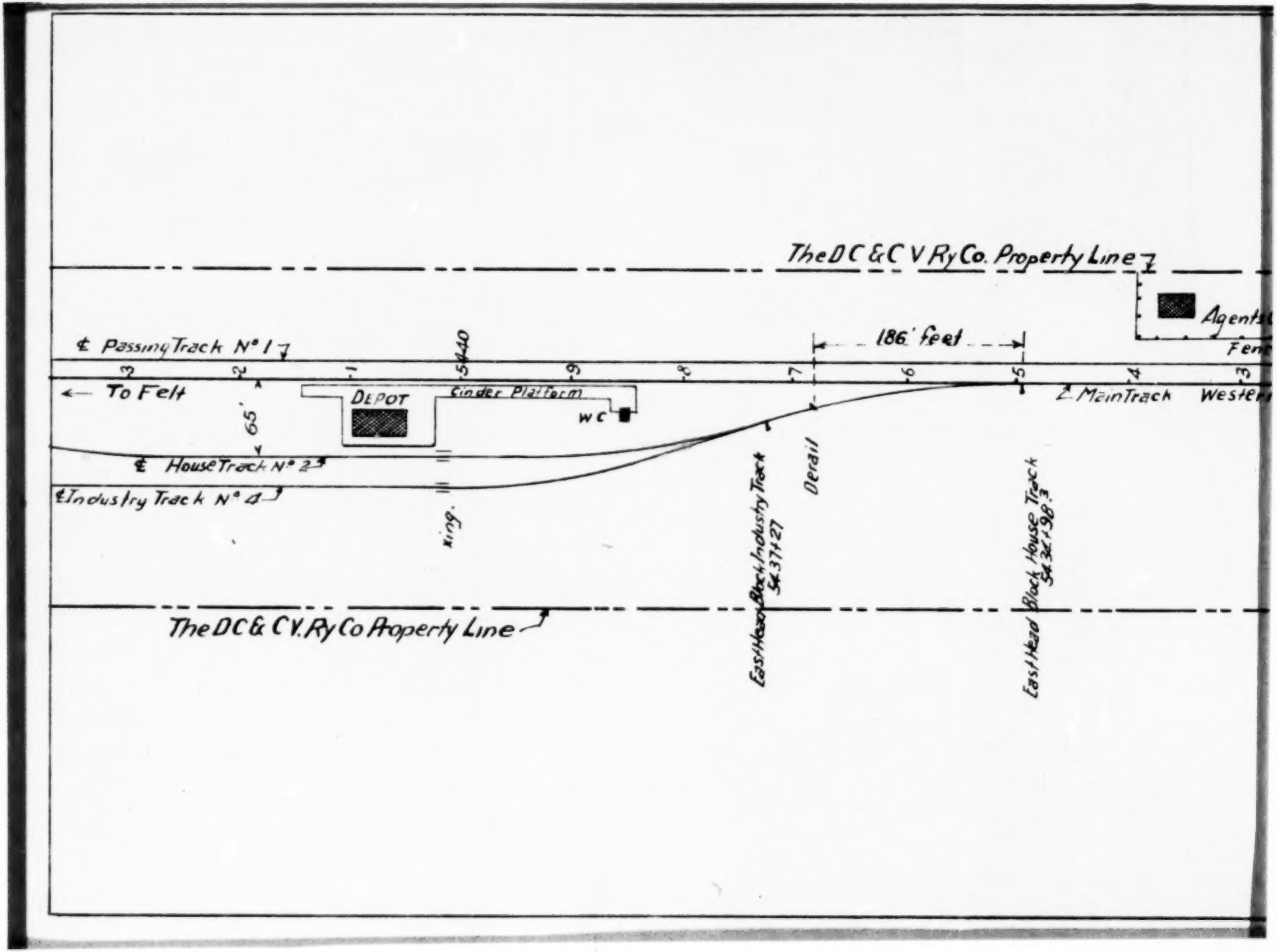
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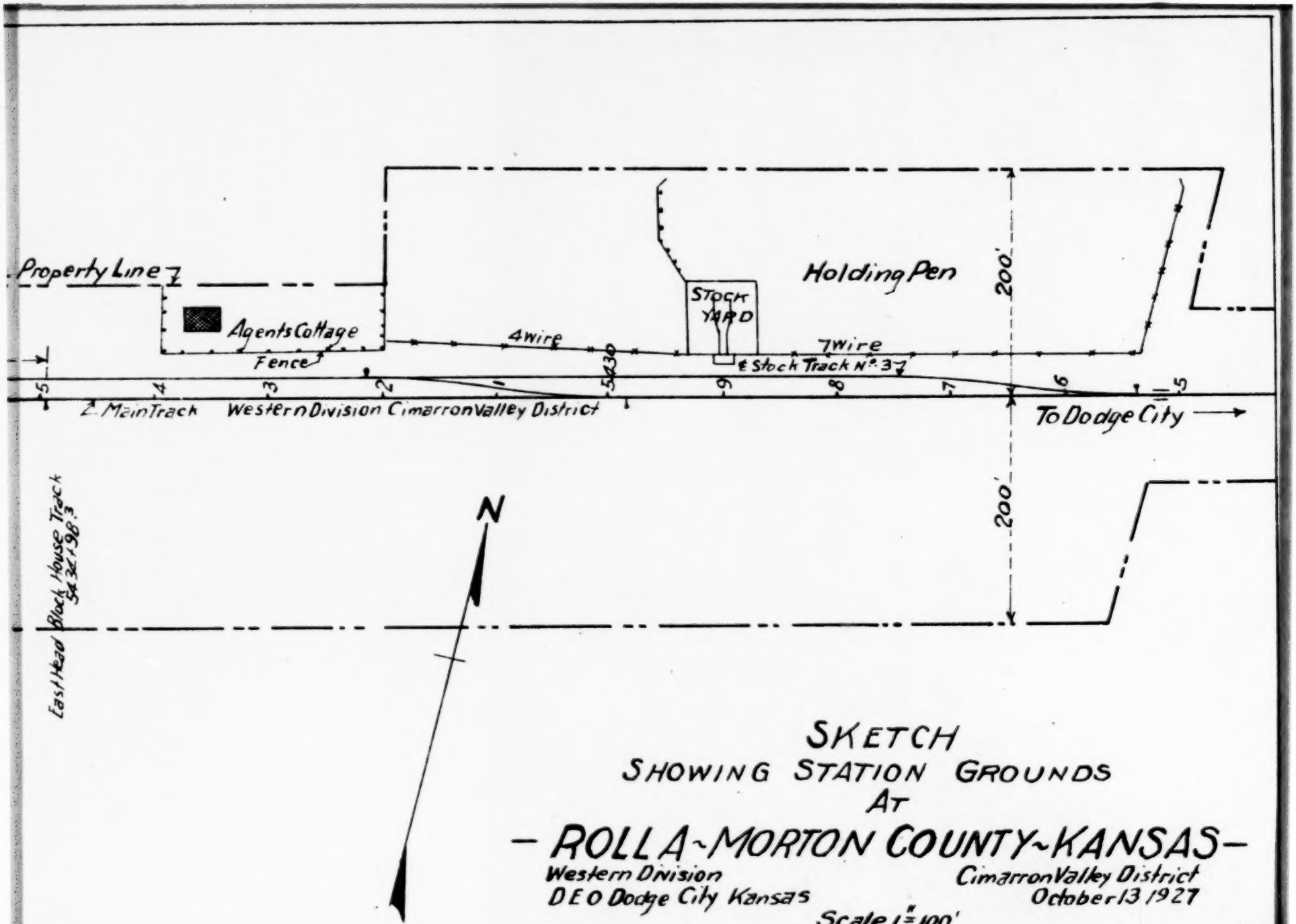
East Head Block House Track
Sec 32 T 98.3
The D C & C V. Ry Co Property Line



SKETCH
SHOWING STATION GROUNDS
AT
— ROLLA ~ MORTON COUNTY ~ KANSAS —

Western Division
D E O Dodge City Kansas

Cimarron Valley District
October 13 1927

Scale 1" = 100'

FILE COPY

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CHARLES ELMO

No. 303.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

VS.

MABEL G. TOOPS, ADMINISTRATRIX OF THE ESTATE OF M. G. TOOPS, DECEASED.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

CARR W. TAYLOR,
JAMES N. FARLEY,
of Hutchinson, Kansas,
Counsel for Respondent.

(34,434)

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF CASE.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

The respondent, Mabel G. Toops, administratrix of the estate of M. G. Toops, deceased, respectfully show to this Honorable Court that the petition of the petitioner for a writ of certiorari should be denied, and in support thereof desires to show to this court that the statement

of facts set forth by the petitioner on page 3 of its petition is incomplete in many important details; and further shows to the court that the following is a true and correct statement of this case. For convenience we have classified and enumerated the uncontradicted and admitted facts by paragraphs as follows:

(a) Conductor Toops was killed on August 13, 1926, at Rolla, Kansas, a station on the Dodge City-Elkhart branch of the petitioner's lines, about 12:30 to 12:45 o'clock in the morning. The night was very dark.

(b) At the time of his death Conductor Toops had been in the service of the Santa Fe Railroad Company for a period of 13 years, or more, and during the 4 or 5 years immediately preceding his death he had been engaged in the passenger train service out of Kansas City, Missouri, and on a different division of the Santa Fe from where the accident took place.

(c) The trip from Dodge City to Elkhart on August 12, was his first trip over that line for a period of approximately thirteen years.

(d) The freight train on the way down from Dodge City to Elkhart did not stop at Rolla, and Conductor Toops therefore had no opportunity to inspect the elevator track at that station.

(e) Rolla, Kansas, is a station on the Elkhart-Dodge City branch, with a population of less than 200, and contains in addition to the main line track, a passing track, a house track and an elevator track running in a general east and west direction through a pronounced cut which, on the south side, resulted in a bank some 8

or 10 feet high close to the main line track on the south side and extending along the elevator track to the south from the main line track so that a person on the elevator track at the derail switch or immediately west thereof or immediately east thereof, is invisible to a train crew operating on the main line east of the elevator switch. This cut is shown by the photographs contained in the record on pages 85 and 86.

(f) Conductor Toops was slightly acquainted with Mr. Hall, the engineer, and with Mr. Phillips, his fireman, but had never before seen either one of the brakemen on his freight train.

(g) When they arrived at Rolla on their way back to Dodge City the engine stopped near the depot. Mr. Nolan was the head brakeman and was on the engine. Conductor Toops and Hemphill, the rear brakeman, were in the caboose and they got off of the train, one going on one side and one on the other until they came to the depot. Four empty cars which had been picked up at Wilburton, a station between Elkhart and Rolla, were sent with the engine eastward and were backed in on the elevator track and attached to 5 cars loaded with grain standing on the elevator track. Nolan, the head brakeman, went with the engine and empty cars, and Hemphill went across to the elevator track and assisted in the coupling up of those cars for their movement out on to the main line track. Those cars were brought back and Conductor Toops coupled them to the train standing on the main line track. The engine went forward with Mr. Nolan, the head brakeman, and was switched on to the passing track from the main line, came back

and pushed the cars together that were fouling the cross-over switch east of the depot. Hemphill left Toops near the depot platform and went over and coupled up the stock cars. 5 of the 15 grain cars on said passing track west of the stock cars, were west of a highway crossing which was kept open. The grain cars east of the crossing were pushed back and were coupled with those 5 cars west of the road crossing, and the whole train was pulled out over the cross-over track on to the main line.

(h) When this train of 27 cars was pulled on to the main line and the cross-over switch closed, brakeman Nolan was still on the front end of those cars. Hemphill was somewhere near the rear end thereof. The elevator track left the main line and ran on a curve in a southwesterly direction along the high bank, 8 to 10 feet high, which extended eastward along the line of the 27 box cars attached to the engine on the main line track. Neither the enginemen nor the brakemen from their positions could see around the curve on account of the high bank.

(i) Nolan, the head brakeman, testified (R. 23 and 24), and his testimony is substantiated by all the other members of the train crew, as follows:

> "There was nobody on the fifteen moving grain cars when they were cut loose from the stock cars and speeded back on this elevator track. Nobody in control of them. They were not lighted in any way. There was no light on the west end of those fifteen grain cars that were moving west. There were no other lanterns visible to me as we kicked those cars except Mr. Hemphill's lantern, and it was purely by his lamp signals that I was working by, and I was unable to see Mr. Toops on account of the curve there and the cars pointing

on this elevator track, wouldn't make it possible for me to see him if he was around the curve. It would make it impossible for me to see further than just the main track switch on account of that 'L' and the curve that is there. If he had been beyond that I couldn't have seen him from where I was working. Mr. Hemphill's kick-in signal could not have been seen from the derail where Mr. Hemphill was standing. *The signal couldn't have been seen from the derail where Mr. Toops' body was found. It couldn't have been seen from there to the cross-over switch where Mr. Hemphill was passing the signal from.* There was no whistle signal given, and I don't believe the bell was rung. I wouldn't want to say for sure because the bell is something you can't very well hear if the cars are moving at the distance I was from the engine. It may have been ringing, but I don't remember if it was. The engine whistle wasn't blown at any time after we started switching in the yard until it was blown to call the agent after we found Mr. Toops' body."

(j) Hemphill, the rear brakeman, gave a kick-in signal to Nolan and the enginemen, but the first attempt to kick-in was not successful because Nolan was too slow in getting on the cars and cutting the 15 grain cars off from the 12 stock cars, and a second signal was given. The cut was successfully made at the second signal and both brakemen remained with the 12 stock cars and the engine and sent the 15 grain cars down the main line track and onto the elevator track with no one on them or in control of them.

(k) The acts of negligence committed by the petitioner as shown by the evidence, may be briefly stated as follows:

First, the kick-in of 15 grain cars.

Second, with no one on them to control them or stop them in case of danger.

Third, no light was on the front end of the moving cars.

Fourth, no kick-in or push signal was given by the engineer by blowing the whistle.

Fifth, the bell was not rung as a warning to any person who might be upon the elevator track.

Sixth, the track was defective at the derail where Conductor Toops was killed, in this, that the ties were practically without ballast or dirt filling between them, and weeds and thistles had grown up between the ties and about the track. It was a skeletonized track and so dangerous as to require extraordinary care for any trainman or other person to cross it without accident on a dark night.

Seventh, Conductor Toops, as we have seen, saw this track by the aid of the light from his lantern for the first time in thirteen years.

Admitted Facts Showing How Conductor Toops Met His Death.

(1) Toops' body was found between the rails of the elevator tracks at the derail with his shoulders jammed against the derail, his body lying diagonally across the track between the rails, with his feet to the east and north, his head and right arm, mashed off by the wheels of the cars, and his hat, were lying south of the south rail of the elevator track near the derail.

Rule 471 (R. 84) reads as follows:

"They (the conductors) must know (so far as possible) that switches are right before attempting to pass or use them, and particularly acquaint themselves with location of *derailing switches* and know they are right before attempting to pass them."

Conductor Toops' lantern and lead pencil were lying together south of the elevator track about 2 or 3 feet away from the south rail of the track, his lead pencil lying between his lantern and the south rail. His train book, a large fold, containing 34 or 35 way bills, was found lying in the center of the track between the rails. The surface of the track between the rails showed clearly that the body of Conductor Toops was dragged westward 2 or 3 feet until his shoulders were jammed against the derail. 4 or 5 cars passed over his body and were standing west of the derail where they stopped for lack of momentum.

(m) Nolan and Hemphill after kicking in the 15 grain cars on the elevator track, then kicked in the 12 stock cars on the passing track with the stock cars. Nolan remained with the engine and closed the cross-over switch at the main line, and coupled the engine when it ran back to the east end of the 15 grain cars standing one or two car lengths west of the cross-over switch on the main line, and then got up on the train. While he was doing this Hemphill set the brakes on the stock cars when they were clear of the cross-over switch connecting with the passing track; then got off of the cars and went south and got on the string of 15 grain cars standing on the elevator track. He gave

a go-ahead signal but the enginemen did not see it. The engine was not then coupled on to the cars. Nolan, after coupling the engine to the cars, climbed on the front end of the standing cars and Hemphill repeated the signal, Nolan relayed it to the engineer, and the train started westward pushed by the engine.

Nolan walked to the second car west from the engine and on to the south side of the roof thereof in order to better signal to the engineer. They ran a few car lengths when Nolan saw Conductor Toops' lantern lying south of the track, and gave the washout or emergency signal apprehending that something was wrong. The train stopped within a car length. Nolan got off and discovered Toops' arm, head and hat, also his lantern and lead pencil, lying between it and the track, south of the track. Nolan's lantern had gone out in his rapid descent off of the car and he made a mark with his heel by the side of Toops' lantern and picked it up and looked for his body and found it lying under the engine in the position hereinbefore described. Blood was found on all of the cars except the first car on the west end of said string of 15 cars.

(n) There was a highway crossing which ran approximately north and south over all of the tracks at Rolla station, about 4 or 5 car lengths west of the depot, as shown by the evidence of Hemphill and Nolan. Hemphill, while speaking of coupling up the stock cars and grain cars which were standing on the passing track north of the depot, said (R. 30): "There was one road crossing cut in the grain cars; otherwise they were coupled together." Nolan testified (R. 23): "There

was a road crossing back there that was cut. There was another coupling back between the engine and the road crossing. The road crossing was west of the depot about 4 or 5 car lengths."

(o) There were no switch lights at Rolla station nor any yard limit signs (R. 37).

(p) There was no lighted lantern on top of those 15 grain cars. Hemphill testified (R. 38): "When I got up on top of those 15 grain cars there was nobody else on top so far as I saw. There wasn't any lantern there. If there had been a lantern up there I would have seen it unless the person had it behind him or hid in some way. You could see anyone with a lighted lantern on top of any of those 15 cars."

Company Rules for Switching Cars at Stations.

(q) A book of rules prepared by appellant and issued to trainmen for their government in the handling of trains, was introduced in evidence. The definition of "station" and "yard" were especially referred to in the evidence by petitioner, and read as follows (R. 28):

> "Station—A place designated on the time-table by name, at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated.
>
> "Yard—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time-table, or by train order, may be made, subject to prescribed signals and regulations."

The undisputed evidence showed that Rolla is a station and comes under the first definition given above.

Conductor's Duty at Stations.

(r) The following rules defining the duties of conductors at stations and especially referred to at this trial, read as follows (R. 84-85):

"Rule 381. Conductors of freight trains are required to do their work thoroughly at stations, bearing in mind that trains are run to do the business of the road and not merely to make time over it. Trains, however, are expected to run with regularity and as nearly on time as the prompt performance of work and rules will permit.

"Rule 396. They must do such switching as shall be necessary in taking cars for their own trains or in leaving cars from the same. Local freight trains are generally to do necessary switching at stations, but any freight train may, in case of necessity, be called upon by Station Agents to do such work, and the same will be performed. Conductors when at stations doing work will attend personally to the switching unless engaged in checking the unloading way-freight as provided in Rule 389, when they may allow Brakeman, if competent, to do the switching.

"Rule 398. When cars are taken on at intermediate stations, they must be carefully examined. They must see that cars already on sidings, as well as those set out by them, are safely and properly left. Cars or engines must always clear the main or other adjoining tracks a safe distance.

"Rule 471. They must know (so far as possible) that switches are right before attempting to pass or use them, and particularly acquaint themselves with location of derailing switches and know they are right before attempting to pass them.

"Rule 483. They will take into consideration that the lives of passengers and trainmen, as well as the property of the company, are entrusted to their care, and it is fully expected and required

that they will not only attend to all signals and instructions, but also that they will, on all occasions, be vigilant and cautious themselves, not trusting alone to signals or rules for safety. Whenever it becomes necessary to protect rear of train engineman will promptly signal flagman as per Rule 14 c)."

(s) The following are the company's rules to be observed by trainmen in stations while switching and moving cars in such stations, to-wit (R. 51):

"Sec. 102. When cars are pushed by an engine (except when shifting in making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need.

"Sec. 320. Trainmen and yardmen, before switching or moving cars at stations, must ascertain that there are no persons or property on or about the same that might be injured or damaged by so doing.

"Sec. 473. They will, in rounding all curves where the view is obscured, sound the whistle, using the signal prescribed in Rule 14 (Rule 14 provides for two distinct whistles).

"Sec. 478. They will use great care in backing up to take a train, or backing into a siding to take or leave cars, and will approach so slowly that couplings can be made without injury to persons or property.

"Sec. 24. When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

Conductor Toops' Movements After He Had Coupled Up the Five Grain Cars to His Train On the Main Line.

The evidence is undisputed that Conductor Toops remained on the station platform going through his

switch list after he had coupled up the 5 grain cars above mentioned. Mr. Nolan, the head brakeman, saw Toops on the platform at the time the 27 stock cars and grain cars were pulled out on the main line over the cross-over switch (R. 24). Hemphill, the rear brakeman, saw Toops on the east end of the platform with his lantern on a truck and his train book in his hand, looking through his switch list (R. 35).

As we have seen from the rules governing the conduct of conductors, hereinbefore quoted, it was Conductor Toops' duty to assist in the switching operations; it was his duty to personally see that the cars were spotted at the respective elevators as called for by the switch list which he was examining when last seen by Nolan and Hemphill, to see that there were no obstructions on the track, that the road crossing west of the depot was left open, that the brakes were properly set to hold the cars at each one of the elevators; and the performance of these duties called him to be on the south side of the elevator track on the engineer's side of the train where switching operations are carried on by the brakemen. The derail on the elevtor track where Toops' body was afterwards found, is about 300 feet east of the depot. There is a path on the south side of the main line eastward from the depot. Conductor Toops followed that path to a point north of the derail and then started south to cross over the elevator track. This is clearly shown by the circumstances surrounding the death of Conductor Toops. The evidence showed conclusively that the elevator track at the derail is skeletonized. Mr. Bryan, witness for the respondent,

testified (R. 81) that there was possibly a gallon of dirt between the ties. Thistles and weeds had grown up between the ties at that place and obscured the real condition of the track. The route which we have just described, which we contend Mr. Toops traveled to the point where he was killed, is the nearest and most practical route from the west end of the depot platform where he was last seen, and it is not unreasonable to conclude that that was the route he took. No eye witness saw Conductor Toops meet his death. The inevitable conclusion must be reached from the physical facts in evidence is that Conductor Toops, when he arrived at the elevator track did not know that the train crew had kicked the 15 grain cars on to the elevator track, for the reason, as shown by the undisputed evidence, that no warning, kick-in, or push signal was given by the engine crew; and that the engine bell was not rung. The track being curved and the rear end of the 15 grain cars not being visible to the engineer or either one of the brakemen because of the high bank that obstructed the view, made it impossible for any lantern signal to be given by the brakeman to Conductor Toops. No brakeman was on the west end of the said grain cars nor was there a white light on the end thereof. So no warning of any kind was given to him of the approach of the 15 grain cars that had been kicked in on the elevator track, notwithstanding the fact that the rules required such warning signals to be given. Conductor Toops had a right to rely upon the performance of the rules in such cases, by the enginemen and the brakemen. Conductor Toops had a right to rely upon the provisions of Rule

473 (R. 51) which provided that in rounding all curves where the view is obscured, a whistle shall be sounded twice, notifying him that the cars are being kicked in on the elevator track. Engineer Hall testified (R. 42): "It is usual for the engineer to give a signal when he is starting up a train on a kick signal." He had a right under the rules to believe and rely upon the fact that one of his brakemen would ride the kicked-in grain cars as they moved on to the elevator switch, and that the brakeman would take a position on the west end of the first car where he light could be distinctly seen as the cars moved westward on the elevator track as provided by Rule 102 which reads as follows (R. 51):

> "Sec. 102. When cars are pushed by an engine (except when shifting in making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the engineman in case of need."

The night was very dark. As we have seen, Conductor Toops was not familiar with the elevator track. He approached it from the north for the first time in 13 years and when he arrived at the track and attempted to cross the same, the law presumes that he was in the exercise of due care; and due care means that he listened for signals and heard none, that he looked for approaching cars and saw none, and that he stepped upon the defective track for the purpose of crossing over same, he instantly became aware that the kicked-in cars were upon him, but on account of the defective condition of the track it was impossible for him to escape; that he then made an effort to stop the train by throwing his lantern to the south side of the

track, his lead pencil going with it, but on account of the curve in the track this signal was not seen and he was knocked down by the west end of the moving grain cars, his train book containing 34 or 35 bills dropped into the center of the track between the rails and was lying 2 or 3 feet east of his body.

ARGUMENT.

The following physical facts show how Toops met his death:

(1) He threw his lantern to the south side of the track as an emergency stop signal, but on account of the curve in the track and the high bank on the south side of the track, there was no one to observe it; and there was no one on the drifting cars to see the lantern and stop the train.

(2) His lantern was found 3 or 4 feet south of the south rail on the elevator track, with his lead pencil lying between it and the track, a second physical fact showing that he carried his pencil and lantern in the same hand.

(3) Hemphill testified (R. 40) that he believed Toops was right handed. That was his recollection. Inasmuch as he was going southward in his attempt to cross the track, it was but natural for him to throw his lantern with his right hand, and at the same time his lead pencil went with it.

(4) A fourth physical fact showing that he was struck by the west end of the 15 grain cars is the testimony of Mr. Hemphill (R. 38) that his train book with 34 or 35 bills in it was found in the center of the track between the rails east of his body. Evidently he was carrying his train book in his left hand at the time he was struck by the train, and dropped it in the center of the track when he was struck by the moving car.

(5) A fifth physical fact is that his body was dragged between the rails after he was knocked down, for a distance of 2 or 3 feet (R. 38). Hemphill testified: "The gravel was a little scuffed and looked like it (the body) might have been turned over and dragged possibly 2 or 3 feet."

(6) The sixth physical fact is shown by the body lying on its back between the rails, with the shoulders jammed against the derail and the feet east and north of the shoulders near the north rail.

The undisputed physical facts show conclusively that Conductor Toops could not have fallen off of the top of the train on to the track. It is certain that if he had climbed up on top of any one of the cars his lead pencil would not have been in his hand but he would have put it in his pocket; also his train book with the bills in it, would have been in his coat pocket. If he had fallen off of the car, both the lead pencil and the train book would have been found in his pockets as he lay with his shoulders jammed against the derail and his feet near the north rail of the elevator track. The position of the lantern shows that it was thrown to the south of the track, and that it did not fall with Conductor Toops from the top of the train as suggested by counsel for the appellant. We contend that no other reasonable hypothesis than that which we have given above can be drawn from the physical facts in this case.

The petitioner has made continuous reference to the fact that Toops knew that these cars were to come back on the elevator track. The testimony regarding that statement is Hemphill's (R. 39), in which he says that

Toops asked him if these 15 cars were all in one cut, and Hemphill told him they were and said that he would take them all in to the elevator track. Toops said: "All right, I will look out for them." Hemphill was the rear brakeman and under the rules it was his duty to take these cars back on to the elevator track. Rule 102 (R. 51) says that a brakeman must take a conspicuous position on the front of the leading car and signal the engine in case of need; and Rule 24 (R. 51) says that a white light must be displayed on the front of the leading car by night. So when Hemphill told Conductor Toops that he would take the 15 grain cars in to the elevator track, Toops expected him to do just that—to take them in, and to ride the front end of them and display a light. Hemphill did not say anything about kicking the cars in; Toops didn't know anything about any custom of kicking cars in, and he had every reason to believe that Hemphill would do just what he said he would do—take the cars in—and Toops was looking out for them. But by Hemphill's own testimony, he did not take the cars in. His testimony is abstracted as follows (R. 36):

> "I do not know that there was anybody on those 15 grain cars when they were separated from the stock cars. There was no light on the cars. There was no light on the west end of the west car."

And on page 38 of the record he testified as follows:

> "When I gave the signal for the kick-in and it was made, there was no signal that I know of given by the engine nor the bell, that I heard."

So we are of the opinion that our case is made stronger by reason of Hemphill's statement to Toops

that he would take the cars in on the elevator track; and then his own testimony and the testimony of other witnesses is to the effect that he did not take them in. It would have been a very simple matter for Hemphill to have made his word good to Toops and have ridden the kick-in cars on to the elevator track to warn Toops or anyone else on the track of their approach. When the engine had the 27 cars out on the main line, they were necessarily all of them east of the cross-over switch, and Hemphill was standing at the cross-over switch so when he gave the kick signal the entire train was east of him. When, in response to his kick signal, they backed the cars up and the west end of the car passed Hemphill, all he would have had to do to have made his word good to Toops and taken the cars in on to the elevator track, would have been for him to swing on to the first car with his lantern. But he did not do that—he just stood there and let the entire 15 cars run past him without anyone on them and without warning to Toops. Then he threw the cross-over switch and rode the stock cars in on to the passing track and stopped them. He knew Toops would not be on the passing track; he knew Toops' duty called him to cross the elevator track; and he had told Toops that he would take the cars in. Under the rules and under his statement to Toops, it was his duty to ride these kicked-in cars on to the elevator track. Mr. Justice Burch in his dissenting opinion attacks the reasoning of the respondent and says in effect that to have observed the rules would have resulted in an absurdity. However, that is not true, as the court will readily see.

It certainly would not be an absurdity for Hemphill to have followed the rules and his promise to Toops that he would take the cars in, and to have gotten on to the front end of the grain cars which were kicked in to the elevator track instead of just standing idly by and letting them all roll past him. He could have ridden these cars in, protected Toops, and then walked back to the cross-over switch and ridden the stock cars in. It would not have taken him over two or three minutes to have done so and thus avoided this terrible accident.

It is no excuse that Toops knew of the coming of the grain cars, as found by the jury. He did not know that they would be kicked in without a signal from the engineer in accordance with the rule; he did not know that they would come silently down upon him without a white light on the end thereof; he did not know that they would come down upon him without a brakeman in charge of and in control thereof and in a conspicuous position on the end of the car where he could see any person upon the track and protect them from the danger. Toops was familiar with all of the rules and had a right to believe that his brakemen and enginemen were familiar with the rules; he had a right to believe that the rules would be observed by each one of his trainmen; it was but natural for him to make the attempt to cross over the track because of the fact that no warning of any kind had been given that the cars were approaching.

The rules of the company hereinbefore quoted and which we have referred to, apply particularly to the duties of trainmen at stations, and those rules applied

with peculiar force to the conduct of the train at Rolla. The definition of "station" will be found on page 28 of the record, and the definition of a "yard" in the same book of rules will be found on page 28 of the record. The trouble with the defense in this action has been that it assumed in the trial of this case that Rolla was a yard and not a station, and attempted to apply yard rules to what happened at a station, instead of applying the rules with reference to a station. We emphasize this for the reason that the distinction is clear and controlling in analyzing the facts in this case. Fireman Phillips' testimony (R. 46) to the fact that it is not the habit to whistle while switching in the yards, does not apply to the tracks at Rolla for the reason that the yard rules do not apply and the rules we have quoted in this brief shows that the yards are excepted, especially in rules 102 and 24 (R. 51). L. A. Arthur testified (R. 55) that a station is where you receive and discharge passengers; that a yard is a place where you switch or make up trains; and that a yard is defined by yard limit signs; and said, "I do not know of any yard limits at this station, and I haven't been out there for some time." Nolan testified (R. 28) that there were no yard limit marks at Rolla station. Arthur's testimony that a station is where you receive and discharge passengers, was not sustained by any rule referred to in the book of rules supplied by the company—it was merely his statement. His further statement that a yard is any place where you switch or make up trains was also in conflict with the definition given in the rule book hereinbefore quoted.

From the foregoing it must inevitably follow that the trainmen were bound by all of the rules in the operation of switching at Rolla, Kansas, and having violated every one of the rules which we have referred to, the company was guilty of negligence. If the court concurs with us in this and also concurs with us as to the manner in which Toops came to his death—that he was struck by the west end of the west car, knocked down and killed—and the physical facts and circumstances are sufficient to warrant that conclusion, then the judgment of the lower court must be sustained.

Under the facts in this case the question of negligence was properly submitted to the jury and has been squarely decided in the case of *Willever* v. *Delaware, L. & W. R. R. Co.,* 89 N. J. L. 697, 99 Atl. 321 (1916) rev'g 87 N. J. L. 348, 94 Atl. 595 (1915) (19 N. C. C. A. 483 n.). That case is very similar to the one before the court now, syllabus 1 reading as follows:

> "Where as a part of its operating system, a common carrier by railroad in interstate commerce has provided and notified its employees of, a rule that in the 'movement of trains' when 'cars are pushed by an engine' a man shall take a 'conspicuous position on the front end of the leading car to signal the engineman in case of need,' and an employee so notified of the rule, who, in the performance of his duties, has, in reliance upon the rule, placed himself 200 feet in front of a long train of empty freight cars not being 'drilled,' and standing on a track not used for 'drilling' purposes, without engine or crew, is run down because a train crew attached an engine to the far end of the train, and without warning pushed it over him without a man being placed on the front end of the leading car in accordance with the

rule, the question of the negligence of the train crew, the common carrier's employees, was properly left to the jury, citing *D'Agostino* v. *Pennsylvania R. R. Co.*, 72 N. J. Law, 358, 60 Atl. 1113, and *Germanus* v. *Lehigh Valley R. R. Co.*, 74 N. J. Law, 662, 67 Atl. 79."

The rules as to the conduct of a train crew in switching trains in yards, in the Willever case, are similar to the rules set forth in this case.

Quoting from the opinion in the Willever case, *supra*:

"The Rule No. 102 quoted above was contained in a book of rules under the subheading 'Movement of Trains.' Some witnesses testified that this book of rules was for the operating of trains out on the main line only and was not intended to apply to yard work. The evidence also showed that the book of rules was given to employees whose duties were exclusively within the yards as well as to employees who worked or ran trains on the main lines. Willever was furnished by the company with a copy of this book of rules. There was nothing in the book of rules to indicate that Rule No. 102 had no application to 'movement of trains' within yard limits, nor was there any evidence that Willever had ever been told that it did not so apply within those limits. The language of the rule itself is, 'When cars are pushed by an engine,' and the subdivision under which it occurs is headed, 'Movement of Trains.' * * * Turning now to the second point relied upon by the supreme court, it is said that Willever having received instruction and knowledge, as a section foreman for five years, that he must look out for his own safety, the defendant company, under the doctrine of assumption of risk, as applied in the case of *Precodnick* v. *Lehigh Valley Railroad Co.*, *supra*, was, as to him, under no duty to give warn-

> ing. We do not think the negligence of defendant's employees in failing to comply with the rule established for Willever's safety was one of the dangers he undertook to look out for, and therefore one of the risks he assumed. Obviously Willever's undertaking to look out for his own safety is, to a certain extent, a relative assumption, and therefore prescribed by the limit of dangers incident to his employment under the system established for the operation of the business. This is necessarily so."

The rule book furnished the Santa Fe employees contains Rule 102 in the identical words as Rule 102 in the Willever case with the exception of the addition of the words in parenthesis "except when shifting or making up trains *in yards.*" We believe that the addition of those words in parenthesis emphasizes and brings more forceably to the attention of trainmen and crew that when switching or making up trains in yards, the crew with which they are operating will not look out for them, that they must look out for themselves in the shifting or kicking in of cars without warning signal; but that when they are on the road and at stations or when shifting cars on tracks which are not in the yards, then they must give warning, and that negligence to do so by a member of the crew is not such a risk as is assumed by the other members.

Rolla, Kansas, is not a yard. The crew was not making up a train. They were in road work and Rule 102 was in full force and effect.

In the case of *Chesapeake & O. R. Co.* v. *Proffitt*, 241 U. S. 462, 134 C. C. A. 37, 218 Fed. 23, the court had before it a case very similar to the one here.

Proffitt, a brakeman, was injured when a collision took place caused by the yard crew who negligently and with undue violence (as the jury doubtlessly found) drove a cut of 29 cars into the standing cars upon which the plaintiff was working. There was some conflicting testimony as to whether or not any signal had been given and as to whether or not anyone was on the cars kicked in against the cars upon which Proffitt was working. In the opinion, page 465, the court said in affirming the judgment of the circuit court of appeals:

> "Whether it was usual, in conducting such switching operations, to have a man at the forward end of the moving cut of cars, was in dispute. Plaintiff testified that 'it is the custom to have a man on the front end of a cut of cars that is being switched into other cars, who looks out for that and runs and stops the engine just before they get there, in making the coupling.' Two of the defendant's witnesses contradicted this; one in terms denying the custom of giving a warning as stated by the plaintiff; the other declaring that 'all the warning he knew of being given, or the practice, was for the men in and about the train to take care of themselves and see for his own danger when he attempts to do any work, and the witness knew of no signals given.' While another and experienced witness, called by the defendant, being asked if it was customary when running in a cut of cars to have a man on the front end with a light, replied: 'Well, on the yard in switching cars they come right down to the book rule. It says where cars are being shoved a man must be placed on the head car.' Whether there was a man at the forward end of the cut of cars that produced the collision in question was in controversy. As to plaintiff's opportunity to gain knowledge of the alleged custom, it did not distinctly appear that he had previously worked on

a manifest train. He testified that he had been employed as a brakeman something more than five years, part of the time as an extra man and part of the time as a regular man; that he was an extra man when hurt; had been a regular brakeman until about three weeks before the accident, when he was 'pulled off the local freight.'

"Plaintiff recovered a verdict for substantial damages, and the judgment was affirmed by the circuit court of appeals (132 C. C. A. 37, 218 Fed. 23)."

In this case the petitioner has virtually admitted and does admit that the rules provided by the company were violated by the switch crew; that there was no man on the rear of the switched cars; that there was no light on the rear of the switched cars; and they admit that no warning, either by whistle or bell, was given by the train crew of the kicking in of the cars, and that the track was defective at the place of the accident.

Their whole petition is based upon the hypothesis that, granting all those acts of negligence, still there is no evidence that the death of Toops was caused by such acts of negligence. In other words, that they were not the proximate cause. It is our contention that whether or not they were the proximate cause of Toops' death were questions for the jury, quite properly submitted to the jury and having been so found by the jury, are conclusive. *Donegan* v. *Baltimore, etc., R. Co.,* (N. Y. 1908) 165 F. 869, 91 C. C. A. 555; *Erie R. Co.* v. *Schleenbaker,* 257 F. 667, 40 Sup. Ct. 13, 250 U. S. 666, 63 L. Ed. 1197; *Southern Pac. Co.* v. *Thomas,* 188 Pac. 268, 41 Sup. Ct. 447, 255 U. S. 576, 65 L. Ed. 793; *Davis* v. *Wolfe,* 44 Sup. Ct. 64, 263 U. S. 239, 241 S. W.

915, 294 Mo. 170; *Hughes* v. *Delaware, D. & W. R. R. Co.*, 233 Fed. 118.

This last cited case, *Hughes* v. *Delaware, D. & W. R. R. Co.*, 233 Fed. 118, is similar to this case in many of its facts. It will be sufficient to quote a small part of it beginning on page 120:

> "It was claimed on the trial, and insisted, and the court submitted the question to the jury, that the defendant was negligent in backing this train on the passenger track, under the circumstances and in view of the surroundings and conditions, without having a light either on the side of the rear car nearest Hughes, or a man there with a light, and the jury found that it was negligence to move that train on the passenger track backward towards the switchman's shanty under the circumstances and surrounding conditions without such precaution, which was perfectly feasible. There was some evidence that this had been done on other occasions, one at least; but it is apparent to any intelligent man that a light could have been attached to one side of the rear end of this moving train—that is, the end nearest Hughes—or that a man taking hold of the grabiron and with his foot in the stirrup and holding a lantern could have seen the track for some little distance in front of the moving train as it proceeded towards the shanty. I think the case was properly submitted to the jury, and that the evidence presented a question of fact for the jury to determine, and that the verdict should not be disturbed.

"*Southern Railway Co.* v. *Smith*, (C. C. A. 6th Circuit) 205 Fed. 360, 123 C. C. A. 488, is a case closely in point. It is there held:

> 'While it is primarily the duty of a switchman in railroad yards to be on the lookout and keep out of the way of moving engines, there is a concurrent or secondary duty, independent

of statute or rule, on the part of those in charge of such moving engines, to keep such lookout as is reasonably necessary to avoid injury to an employee who may neglect to protect himself, and the extent of such duty is measured by the peculiar circumstances of the case.

'While plaintiff's intestate, who was a switchman in defendant's railroad yards, was walking along a track in the yards at night, he was overtaken and killed by an engine which was "drifting" or moving slowly behind him on the track, making very little noise. Its headlight was dim, and rendered more so by the electric yard lights, and there was a train passing on an adjoining track, which covered what noise the engine made. It could have been stopped within 10 feet, but the engineer did not see deceased. Held, that the facts tended to show that the engineer was negligent, and his negligence had a causal relation to the injury, and that a verdict for plaintiff was supported by the evidence.'

* * * * *

"The jury well may have found that to move these cars by backing down on the passenger track, under such conditions and surroundings, in the darkness, with no light at all at that end of the train, and only a man with a lantern on top of the car, was negligence. It was, of course, the duty of the defendant and of those moving these cars to keep such lookout as was reasonably necessary to avoid doing injury to an employee who under the circumstances might have neglected to fully protect and care for himself. The extent of the duty depended on the circumstances of the case, and the question was in my judgment one for the jury to determine."

If by any stretch of the imagination the petitioner could persuade this court that Rolla was a yard and

not a station, then it would still have to contend with the undisputed fact that Conductor Toops was an utter stranger both to the tracks at Rolla, Kansas, to the crew, and to their method of conducting switching operations. Mr. Toops had been in the employ of the Santa Fe for a good many years but had not been over this branch line for 13 years. He had been employed in the passenger service for the four or five years immediately preceding the accident. He had never seen either of the brakemen and was but slightly acquainted with the engineer and the fireman. There was some testimony of a custom of kicking cars without warning, but there was also the testimony of the engineer, Robinson (R. 82), that "it was not the custom to back cars where you could not see the end, without somebody to protect whoever might be on the track, whether there is a roadway or not"; and Engineer Hall testified (R. 42), "It is usual for the engineer to give a signal when he is starting up a train on a kick signal." So it would still be a question for the jury as to whether or not there was such a custom. In addition to that there is the silence of the entire record as to whether or not Toops knew of such a custom; and if he did not know of such a custom, then he could not be charged with negligence for not observing it. No one told him about such a custom; in fact, there was no such custom proven. Toops did not assume the risks of the defective track nor the negligent operation of the train.

36 C. J. 692, Paragraph 896, states the substantive law on the assumption of risk. It is as follows:

"Risks which arise from the negligence of the master or those representing him are not 'ordinary risks' incident to the employment, but are 'extraordinary risks.' Hence, under the general rule as to extraordinary risks, but subject to the limitations hereinafter considered, risks which result from the negligence of the master, that is to say, those risks which are avoidable by reasonable care on his part, are not assumed by the servant. The master, in the proper performance of his duties as such, is bound to exercise care and prudence to prevent his employees from being subjected to unreasonable risks or dangers, and to agree by implication of law not to subject a servant employed by him to extraordinary or unusual perils, and the servant has the right to assume that the master will perform his duty in this respect, except to the extent that the rule may be modified as to risks that are so open and obvious that a man of ordinary prudence would see and appreciate them; and it is very generally declared that the risk assumed commences only after the master has exercised due care in the performance of the duties which the law casts upon him."

18 R. C. L., Master and Servant, paragraphs 167 and 168, read as follows:

"Risks 'Assumed'; 'Ordinary' Perils of Employment—The dangers in respect of which there can be no recovery for injuries by virtue of the doctrine of assumption of risk include but according to the generally accepted statement do not extend beyond the 'ordinary' risks of the employment or such as are 'incident' thereto. And the 'ordinary' risks incident to the service are those perils of which employees have notice or which are patent and obvious to them. To risks which arise after the commencement of employment, as well as to those contemplated when the service began, the doctrine of assumption of risk applies, but a

change of appliances of which an employee has no knowledge or notice is not a risk which he assumed.

"Employer's Negligence as Included among Risks 'Assumed.'—A topic that has given rise to much comment and not a little confusion is whether the employee 'assumes the risk of the employer's negligence.' A note of indefiniteness is noticeable in many of the expressions, and some statements are quite unintelligible. It is generally asserted without qualification that the employee does not assume the risk of the employer's negligence, but just what conception is embodied by this expression is not directly explained. It is reasonably certain, however, that what is meant is that the employee is not barred of recovery for injuries due to perils of which he has no knowledge and appreciation. It must be constantly borne in mind that liability is to be determined with a view to the comparative knowledge of the parties. Primarily the employer is bound to provide for the safety of his employees, and the employees have a right to rely upon the performance of this duty. They are not barred of recovery for injuries—or in the terminology of the present topic they do not 'assume the risk'—occasioned by the failure of the employer to perform his primary duty, unless they have actual or constructive knowledge of the dereliction and of the perils arising therefrom, and continue in the employment without protest or complaint. The principle, it will be noted, is that of contributory negligence. So the employee does assume the risk of the employer's negligence when the fact of such negligence is known and the danger therefrom appreciated by him. Under the rule of the common law the employer virtually may conduct his business according to his own ideas, although another method would be less dangerous, and if his employee knows the hazards incident to the business in the manner in which it is carried on, and continues in the employment, he 'assumes the risks' of the more dangerous meth-

od. Accordingly, if the employer furnishes his employee with a tool, apparatus or machine that is not reasonably safe, and the employee proceeds with the work with the full knowledge of the defect and danger, there can be no recovery in case of a resulting injury; for, it is said, the employee 'assumed the risk.' Again, if the employee consents to occupy the place assigned him in which to work, and to incur all the dangers incident thereto, having sufficient intelligence and experience to enable him to comprehend such dangers, his assent dispenses with the performance of the employer's duty to furnish him with a safe place in which to work."

The petitioner says on page 36 of its petition that there was no cut. This is entirely contrary to the record. Practically every witness who testified on either side of the case, testified that there was a cut, and the two photographs (R. 85 and 86) show that there was a cut. The first photograph shows the high bank on the south side, and the second photograph shows distinctly the cut. The pictures are not very clear copies, but the court, by reference to them, can readily see that the cut obscures all but the top part of the elevators. It is higher than the eaves of the depot, and on the north side of the tracks the foundation of the agent's house and the fence around the house, are 6 or 8 feet above the track level. Certainly this is a cut.

The case of *C. R. I. & P. R. R. Co.* v. *Ward*, 252 U. S. 18, is a case very much in point here. In that case Ward, a switchman was thrown from the top of a box car upon which he was about to apply the brake. There was no question of the insufficiency of the equip-

ment. The only question was the contributory negligence of his fellow servants and assumption of risk. The court said on page 21:

"As to the nature of the risk assumed by an employee in actions brought under the Employers' Liability Act, we took occasion to say in *Chesapeake & O. R. Co.* v. *DeAtley*, 241 U. S. 310, 315, 60 L. ed 1016, 1020, 36 Sup. Ct. Rep. 564: 'According to our decisions, *the settled rule is not that it is the duty of an employee* to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, *but that the employee may assume that the employer or his agents have exercised proper care* with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.' The Federal Employers' Liability Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk. 241 U. S. 313. See also *Chesapeake & O. R. Co.* v. *Proffitt*, 241 U. S. 462, 468, 60 L. ed. 1102, 1106, 36 Sup. Ct. Rep. 620; *Erie R. Co.* v. *Purucker*, 244 U. S. 320, 61 L. ed. 1166, 37 Sup. Ct. Rep. 629.

"Applying the principles settled by these decisions to the facts in this case, the testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman, so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which

should have been detached. For the lack of proper care on the part of the representative of the railway company while Ward was in the performance of his duty, he was suddenly precipitated from the front end of the car by the abrupt checking resulting from the failure to make the disconnection. This situation did not make the doctrine of assumed risk a defense to an action for damages because of the negligent manner of operation which resulted in Ward's injury, and the part of the charge complained of, though inaccurate, could have worked no harm to the petitioners. It was a sudden emergency, brought about by the negligent operation of that particular cut of cars, and not a condition of danger, resulting from the master's or his representatives' negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed, had opportunity to know and appreciate it, and thereby assumed the risk" (our italics).

Another case in which both the question of assumption of risk and defective appliances, were at issue, is that of *Gila Valley, G. & N. R. Co.* v. *Hall*, 232 U. S. 94. In that case Hall recovered judgment for injuries sustained by him in the wreck of a three-wheeled gasoline velocipede which had a defective wheel. On page 100 of the decision the supreme court indulges in some presumptions and inferences which are infinitely more far-fetched than would be any presumption or inference in the instant case. On the question of the assumption of risk, the court said, page 101:

> "'The true test is not in the exercise of ordinary care to discover dangers, by the employee, but whether the defect is known or plainly observable by him. An employee is not charged by law with the assumption of a risk arising out of

defective appliances provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances.' This, we think, was a correct instruction under the circumstances of the case. An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence unless the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence it must appear not only that he knew (or is presumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person, under the circumstances, would have appreciated it. *Union P. R. Co.* v. *O'Brien*, 161 U. S. 451, 457, 40 L. ed. 766, 770, 16 Sup. Ct. Rep. 618; *Texas & P. R. Co.* v. *Archibald*, 170 U. S. 665, 671, 42 L. ed. 1188, 1191, 18 Sup. Ct. Rep. 777; *Choctaw, O. & G. R. Co.* v. *McDade*, 191 U. S. 64, 68, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24; *Texas & P. R. Co.* v. *Swearinger*, 196 U. S. 51, 62, 49 L. ed. 382, 387, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422; *Burns* v. *Delaware & A. Teleg. & Teleph. Co.*, 70 N. J. L. 745, 752, 67 L. R. A. 956, 59 Atl. 220, 592, 17 Am. Neg. Rep. 673."

The case of *Illinois Cent. R. Co.* v. *Norris*, 245 Fed. Rep. 926, is a case which arose in the State of Illinois and was taken on error to the District Court of

the United States for the Eastern District of Illinois. Norris was killed while in the act of coupling up two cars. The engineer testified that he received the signal to back up; that shortly before he received the signal, he saw on the same side of the train, two lanterns, one of which he believed was carried by the brakeman, and one by the conductor. The conductor testified that he did not know where Norris was nor did he see him or his lantern shortly before he gave the signal to back up; that he did not know nor was it his duty to find out Norris' exact position before giving the signal to back up.

We quote now from the court's opinion on page 929:

> "Defendant further contends that the evidence, viewed most favorably to the plaintiff, fails to support a verdict against it, and that the motion to direct the verdict for the defendant should have been granted. The alleged negligence of the defendant was based upon the action of the conductor in directing the engineer to back up the train when Norris was between the cars and subject to be injured by any sudden and unexpected movement of the cars. It appears from the testimony of the engineer that, immediately before receiving this signal to back up, he looked out of the cab window and saw upon the same side of the train, lights from two different lanterns, and it is well nigh impossible to conclude that these two lanterns were held by any one other than the conductor and the brakeman, Norris. It is therefore contended by the plaintiff, that, the brakeman being between the conductor and the engineer shortly before the signal to back was given and he having disappeared at the time the signal was given, the conductor was negligent in direct-

ing a movement of the train which was necessarily fraught with such danger to the life of the brakeman.

"Defendant contends that, notwithstanding this evidence, it was free from neglect, because of the testimony of the conductor to the effect that he did not see the brakeman and that, it was not his duty to locate him before giving the signal. We cannot accept the defendant's contention, notwithstanding the conductor's statement that each employee looked out for himself, and that it was not customary for a conductor to ascertain where his men were before he gave a signal. We are convinced that the evidence warranted the jury in finding the conductor negligent upon the facts disclosed by the testimony in this case. The testimony justified the jury in finding that the conductor had good reason to believe the brakeman was between the cars. It was the brakeman's duty to go between the cars and release angle cocks and shut off the air in switching cars.

"Where the brakes are operated by air, it is necessary for the brakeman or conductor to 'cut the line' as well as to uncouple the cars. Norris had been constantly so engaged to the knowledge of the conductor. He was supplied with a lantern. Both men were busily engaged in a common task and were only a short distance apart. If Norris' lantern was not in sight, the conductor had good reasons to believe that he was between the cars. The conductor, on cross examination, admitted that it was the duty of each of them (the conductor and the brakeman) 'to look out for each other as much as possible.' We conclude that the jury was amply justified from all the evidence in finding the conductor guilty of negligence in the respect claimed by the plaintiff.

"Nor did the deceased assume the risk of such signal being carelessly given. We may well accept the statement that each employee in switching operations, was to look out for himself, and yet

a brakeman could not be said to have assumed the risk arising from the negligent conduct of the conductor. The brakeman was not chargeable with notice that his fellow employee would violate a rule or a custom. He had reason to believe the conductor would not move the train while he was between the cars. If, as the conductor said, it was his duty to look out for the brakeman as much as possible, the brakeman had a right to assume that such duty would not be violated. *We conclude no error was committed in submitting both the questions of the defendant's negligence and the deceased's assumption of risk to the jury*" (our italics).

You will note the circumstances in the above quotation in the third paragraph where the conductor on cross examination said it was the duty of trainmen "to look out for each other as much as possible." In this case we do not have the direct evidence that it was their duty to look out for each other as much as possible, but we do have the evidence of Mr. Nolan that he had been trying to locate Mr. Toops' lantern (R. 26), and also the evidence of Mr. Hemphill that when the engineer stopped he thought it was because they had gotten out of sight and the engineer had stopped for a signal, and he gave him a back up signal before he discovered that something had happened (R. 37). So we believe that we are safe in saying that it is the duty of members of a railroad crew to look out for each other as much as possible. That is common sense. Surely railroad men must work together. They are none of them a law unto themselves. The engineer must back on signal and the signal must come from the brakeman. Surely one brakeman doesn't just decide that they are

going to back up and give the signal. They must work together. In this case they didn't work with Mr. Toops. They forgot all about him. They knew what his duties were—that he should cross the track and assist in the switching. He had a bright lantern, easily visible. There was nothing on earth but the cars upon which they were working to obstruct the view of his lantern, and if they didn't see his lantern they should have known he was in a place of danger and should not have given the back up signal without knowing where he was or without giving some warning signal that they were about to back the cars without anyone on them and without a light being on them. Surely he was entitled to that whether the track was good or not and whether he was a stranger to this territory or not, and the fact that the track was defective and negligently constructed, and so found by the jury, and the fact that he had not been down there for thirteen years, that he didn't know the location of the tracks other than approximately, that he did not know the switch crew nor their method of switching and that there were no switch lights, was all the more reason why they should have fulfilled to the letter the rules and regulations prescribed by the company, or have given him some warning or have instructed him as to the custom of this crew.

The case of *Central R. Co. of New Jersey* v. *Colasurdo*, 192 Fed. Rep. 901, was another case in which the injury was occasioned by the kicking in without warning of unlighted cars. Two people were injured in this accident, one was killed and Colasurdo lost his

leg and filed this action. The plaintiff and two others were repairing a switch in the Jersey City yard. Shortly before the accident occurred a train of four cars arrived at the station and after discharging its passengers the four cars were kicked back to the station platform for reloading. They had no motive power and were controlled only by their own brakes. Quoting now from this case on page 902:

> "There was testimony from which the jury may have found that this train was not lighted and was running at the rate of ten miles an hour in charge of a single brakeman, that no signal or warning of its approach was given and that the brakes were not applied until the train was but six or eight feet distant. There can be no question that the three men, all of them experienced railroad men, were taken by surprise. Nighland was killed, the plaintiff lost his leg and Saldero escaped. If the testimony of the witness Gallagher be true, it seems incredible that some one of the three did not hear his shouts and whistles or see the lights on the platform of the advancing car. The fact that two of the men were run down is persuasive testimony that the car approached them silently and unseen.
>
> "We cannot believe that the risk of being injured in this manner while engaged in discharging his duty, was assumed by the plaintiff. He assumed the usual and ordinary risks of the calling, but when ordered to repair a track at night he had a right to assume that some precaution would be taken to guard him against extraordinary danger. If a watchman were not stationed to warn him of the approach of trains, he at least had a right to expect that a train would not back down upon him with no notice of its approach and no attempt to apply the brakes until only eight feet distant.
>
> "We have no doubt, if the federal liability act is applicable, that a cause of action was estab-

lished, for under it contributory negligence is no defense and the defendant is liable for the negligence of its employees Nighland and Gallagher."

The petitioner has sought by various means to becloud, both in the lower court and in this court, the meaning of its rules regarding the maintenance of a warning to switchmen while operating trains in stations. It has sought to nullify that rule by claiming that Rolla was not a station but a yard. This is not true. Rolla, Kansas, is a station. There are no yards and trains are not made up in Rolla, Kansas. There are some switching operations carried on there, of course, and they provide for those operations by appropriate rules and regulations. Rule 381 (R. 83) provides that conductors of freight trains are required to do their work thoroughly at stations. Rule 320 (R. 83) says that "trainmen and yardmen before switching or moving cars at stations, etc.," and No. 396 (R. 83) says that "local freight trains are generally to do necessary switching at stations, but any freight train may in case of necessity be called upon by station agents," and then in the same rule, that "conductors when at stations doing work will attend personally to the switching unless otherwise engaged." We do not see by any stretch of the imagination how Rolla, Kansas, could be called a yard. It is not a terminal; no trains are made up there; the only trains which go through are trains made up in the yard at Dodge City and dispatched on this line to Elkhart, and then trains are made up at Elkhart for Dodge City, and all intermediate points are stations; no branch line comes into Rolla; there are no yard limit

signs and not even switch lights at Rolla, Kansas. The rule book defines "station" as a place designated on the time table by name and at which a train may stop for traffic, or to enter or leave the main track or from which fixed signals are operated (R. 82); while "yard" is defined as a system of tracks within *defined limits* provided for the making up of trains, storing of cars and other purposes over which movements not authorized by time table or by train order may be made subject to prescribed signals and regulations (R. 83). If Rolla, Kansas, is not a station, then the Santa Fe Railway Company does not have a station anywhere, and the fact that they do have stations is testified to by the rule book and the many rules therein contained for the operation of trains *through stations.* The only question is: Does the place come within *the rule defining a station?* Rolla comes squarely under the station rule. All the evidence of the witnesses was that Rolla is a station. It follows that Rolla is a station and rules No. 24 and No. 102 providing for the placing of either a brakeman or a light on the rear end of the kicked car, are applicable. Failure to comply with these rules as well as the failure of the switchman to comply with the custom of giving a signal, was negligence and so found by the jury; and such negligence was the direct and proximate cause of Toops' death.

The petitioner has cited extensively from, and seems to rely greatly upon the recent case of *Toledo, St. L. & W. R. Co.* v. *Allen,* 276 U. S. 165. We have studied this case carefully and it is easily distinguished from the present case in many of its important phases.

First, in the Allen case the accident happened in a busy yard, while in the instant case the accident happened at a way station.

Second, Allen was a car checker and had been employed in the yards for about 18 months immediately previous to the accident, while here Toops had not been over these tracks for many years and had not worked on a freight crew for 4 or 5 years.

Third, the court said in the Allen case (p. 171):

> "And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard."

In our case there is a complete lack of evidence that Toops was acquainted with any custom of "kicking" cars. The evidence that there was any such custom, was disputed, and certainly it remained for the jury to weigh the evidence.

Fourth, the court said in the Allen case on page 171:

> "In any event plaintiff assumed the risk. He was familiar with the yard and the width of the space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him."

While here, Toops was not familiar with the tracks at Rolla—he did not know where they were except in a general way—he can hardly be charged with the sharp curve or the high bank, and certainly he did not know of the "skeletonized" condition of the track. The night was dark and these conditions were not obvious and were not fully known and appreciated by him.

Fifth, in the Allen case, Allen was a car checker and not a member of the crew, and the court held that in the absence of actual knowledge on the part of the crew they were not required to vary their usual practice. In this case Toops was the conductor. They knew he was the conductor. They are charged with a knowledge of the provisions in the rules, that kicked-in cars at stations must be protected by a man or by a light. They knew they were strangers to Toops; they knew that he had to cross the elevator tracks and that it was a place of danger. No custom of kicking cars was proven and there is not a scintilla of evidence that Toops had ever heard of such a custom, much less that he knew any such custom existed among the members of this particular crew. So this crew knew that Toops was in a place of danger, or, in the exercise of any care at all, they should have known he was in peril.

In conclusion, we cannot refrain from mentioning the dissenting opinion. It will be noted that the dissenting opinion was written by one justice. Two others dissented to the opinion of affirmance but they did not concur in the dissenting opinion. Mr. Justice Burch seems to have gone off on a tangent and labored under the impression that because there were no eye witnesses the respondent could not recover because no on knew exactly how his death occurred. That is not the law, of course, and the reasoning applicable is admirably stated in the case of *Kelly* v. *Union Pac. Ry. Co.*, 141 N. Y. App. 490, 125 S. W. 818, wherein the court stated the proposition as follows (p. 820):

> "The evidence leaves a possibility of the deceased's death resulting from circumstances or

causes for which defendant would not be liable. But we think it showed sufficient facts and developed sufficient circumstances which united gave ample ground for the jury to say with reasonable certainty that the proximate cause of the death was defendant's negligence in leaving the wheelbarrow where it was. And reasonable certainty is all that is required. A possibility of a cause for which defendant would not be liable is not enough to outweigh a probability of such nature and carrying such strength as to produce reasonable certainty in the minds of a jury. A mere possibility will not justify a jury in finding a defendant innocent in a criminal prosecution. The fact that the catastrophe which happened to deceased was unseen will no more cut out a right to show by circumstances the cause of its occurring than would the unseen commission of a crime prevent conviction on circumstantial evidence. So after due consideration of the suggestions made by defendant as to the sufficiency of the evidence, we have concluded it was ample to sustain the verdict, and hence find there was no error in refusing the demurrer."

It is our contention that the case was properly submitted to the jury and that the evidence introduced is ample to sustain their findings, and that, therefore, the petition of the Atchison, Topeka & Santa Fe Railway Company for a writ of certiorari should be denied.

Respectfully submitted,

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Attorneys for Respondent.

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No. 303.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1929.

THE ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, PETITIONER,

VS.

MABEL G. TOOPS, ADMINISTRATRIX OF THE ESTATE OF M. G. TOOPS, DECEASED, RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF RESPONDENT.

CARR W. TAYLOR,
JAMES N. FARLEY,
of Hutchinson, Kansas,
Attorneys for Respondent.

(34,434)

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF RESPONDENT.

STATEMENT.

This action was brought under the Federal Liability Act by Mrs. Mabel G. Toops, Administratrix of the estate of M. G. Toops, deceased, for the benefit

of herself and her daughter as the surviving wife and daughter of M. G. Toops, who was killed while in the employ of the Santa Fe Railroad Company on the 13th day of August, 1926, at Rolla, Kansas. Petitioner admitted that Conductor Toops was engaged in interstate service and that the action was properly brought under the Federal Liability Act. The case was thoroughly tried, all the evidence was introduced and heard by the court and jury, the court fully instructed the jury as to the law of the case, and the jury returned their verdict and special findings of fact, basing the same on ample testimony. The petitioner's motions for judgment and for a new trial were overruled and judgment rendered on the verdict in favor of respondent. The Railroad Company appealed from the judgment rendered, and the Kansas Supreme Court affirmed the judgment of the lower court, the case being reported in 128 Kan. 189. Three justices dissented, and Mr. Justice Burch wrote a dissenting opinion. The opinion of the court is incorporated in the record, beginning at page 91 and ending on page 106. The dissenting opinion by Mr. Justice Burch will be found in the record, pages 106 to 116, and it is also incorporated in petitioner's brief, pages 38 to 48.

For convenience and in order to aid the court, we have classified and enumerated the uncontradicted and admitted facts shown by the evidence in this case, by paragraphs. We have done this because the petitioner has incorporated in its brief a statement of facts which we deem wholly insufficient and lacking in many of the essential details which were established

by the evidence and considered by the trial court and jury. The petitioner apologizes for its meager statement of facts in the following language in its brief (p. 13):

> "In our statement of facts it would seem as though the statement was a very brief one, and yet we think that this statement contains all the pertinent evidence as to the essential facts attending the death of Toops. Of course, evidence was introduced on various collateral matters, but we think that our statement contains the really essential facts."

(a) Conductor Toops was killed on August 13, 1926, at Rolla, Kansas, a station on the Dodge City-Elkhart branch of the petitioner's lines, about 12:30 to 12:45 o'clock in the morning. The night was very dark.

(b) At the time of his death Conductor Toops had been in the service of the Santa Fe Railroad Company for a period of 13 years, or more, and during the 4 or 5 years immediately preceding his death he had been engaged in the passenger train service out of Kansas City, Missouri, and on a different division of the Santa Fe from where the accident took place.

(c) The trip from Dodge City to Elkhart on August 12, was his first trip over that line for a period of approximately thirteen years.

(d) The freight train on the way down from Dodge City to Elkhart did not stop at Rolla, and Conductor Toops therefore had no opportunity to inspect the elevator track at that station (R. 22).

(e) Rolla, Kansas, is a station on the Elkhart-Dodge City branch, with a population of less than 200,

and contains in addition to the main line track, a passing track, a house track and an elevator track running in a general east and west direction through a pronounced cut which, on the south side, resulted in a bank some 8 or 10 feet high close to the main line track on the south side and extending along the elevator track to the south from the main line track so that a person on the elevator track at the derail switch or immediately west thereof or immediately east thereof, is invisible to a train crew operating on the main line east of the elevator switch. This cut is shown by photographs contained in the record on pages 85 and 86.

(f) Conductor Toops was acquainted with Mr. Hall, the engineer, and with Mr. Phillips, his fireman, but had never before seen either one of the brakemen on his freight train.

(g) When they arrived at Rolla on their way back to Dodge City the engine stopped near the depot. Mr. Nolan was the head brakeman and was on the engine. Conductor Toops and Hemphill, the rear brakeman, were in the caboose and they got off of the train, one going on one side and one on the other until they came to the depot. Four empty cars which had been picked up at Wilburton, a station between Elkhart and Rolla, were sent with the engine eastward and were backed in on the elevator track and attached to 5 cars loaded with grain standing on the elevator track. Nolan, the head brakeman, went with the engine and empty cars, and Hemphill went across to the elevator track and assisted in the coupling up

of those cars for their movement out on to the main line track. Those cars were brought back and Conductor Toops coupled them to the train standing on the main line track. The engine went forward with Mr. Nolan, the head brakeman, and was switched on to the passing track from the main line, came back and pushed the cars together that were fouling the cross-over switch east of the depot. Hemphill left Toops near the depot platform and went over and coupled up the stock cars. 5 of the 15 grain cars on said passing track west of the stock cars, were west of a highway crossing which was kept open. The grain cars east of the crossing were pushed back and were coupled with those 5 cars west of the road crossing, and the whole train was pulled out over the cross-over track on to the main line.

(h) When this train of 27 cars was pulled on to the main line and the cross-over switch closed, Brakeman Nolan was still on the front end of those cars. Hemphill was somewhere near the rear end thereof. The elevator track left the main line and ran on a curve in a southwesterly direction along the high bank, 8 to 10 feet high, which extended eastward along the line of the 27 box cars attached to the engine on the main line track. Neither the engineman nor the brakemen from their positions could see around the curve on account of the high bank.

(i) Nolan, the head brakeman, testified (R. 23 and 24), and his testimony is substantiated by all the other members of the train crew, as follows:

"There was nobody on the fifteen moving grain cars when they were cut loose from the stock cars and speeded back on this elevator track. Nobody in control of them. They were not lighted in any way. There was no light on the west end of those fifteen grain cars that were moving west. There were no other lanterns visible to me as we kicked those cars except Mr. Hemphill's lantern, and it was purely his lamp signals that I was working by, and I was unable to see Mr. Toops on account of the curve there and the cars pointing on this elevator track, wouldn't make it possible for me to see him if he was around the curve. It would make it impossible for me to see further than just the main track switch on account of that 'L' and the curve that is there. If he had been beyond that I couldn't have seen him from where I was working. Mr. Hemphill's kick-in signal could not have been seen from the derail to where Mr. Hemphill was standing. *The signal couldn't have been seen from the derail where Mr. Toops' body was found. It couldn't have been seen from there to the cross-over switch where Mr. Hemphill was passing the signal from.* There was no whistle signal given, and I don't believe the bell was rung. I wouldn't want to say for sure because the bell is something you can't very well hear if the cars are moving at the distance I was from the engine. It may have been ringing, but I don't remember if it was. The engine whistle wasn't blown at any time after we started switching in the yard until it was blown to call the agent after we found Mr. Toops' body."

(j) Hemphill, the rear brakeman, gave a kick-in signal to Nolan and the enginemen, but the first attempt to kick-in was not successful because Nolan was too slow in getting on the cars and cutting the 15 grain cars off from the 12 stock cars, and a second

signal was given. The cut was successfully made at the second signal and both brakemen remained with the 12 stock cars and the engine and sent the 15 grain cars down the main line track and onto the elevator track with no one on them or in control of them.

Admitted Facts Showing How Conductor Toops Met His Death.

(k) Toop's body was found between the rails of the elevator tracks at the derail with his shoulders jammed against the derail, his body lying diagonally across the track between the rails, with his feet to the east and north, his head and right arm, mashed off by the wheels of the cars, and his hat, were lying south of the south rail of the elevator track near the derail. Rule 471 (R. 84) reads as follows:

> "They (the conductors) must know (so far as possible) that switches are right before attempting to pass or use them, and particularly acquaint themselves with location of *derailing switches* and know they are right before attempting to pass them."

Conductor Toops' lantern and lead pencil were lying together south of the elevator track about 2 or 3 feet away from the south rail of the track, his lead pencil lying between his lantern and the south rail. His train book, a large fold, containing 34 or 35 bills, was found lying in the center of the track between the rails (R. 38). The surface of the track between the rails showed clearly that the body of Conductor Toops was dragged westward 2 or 3 feet until his shoulders were jammed against the derail.

4 or 5 cars passed over his body and were standing west of the derail where they stopped for lack of momentum.

(1) Nolan and Hemphill after kicking in the 15 grain cars on the elevator track, then kicked in the 12 stock cars on the passing track with the grain cars. Nolan remained with the engine and closed the cross-over switch at the main line, and coupled the engine when it ran back to the east end of the 15 grain cars standing one or two car lengths west of the cross-over switch on the main line, and then got up on the train. While he was doing this Hemphill set the brakes on the stock cars when they were clear of the cross-over switch connecting with the passing track; then got off of the cars and went south and got on the string of 15 grain cars standing on the elevator track. He gave a go-ahead signal but the enginemen did not see it. The engine was not then coupled on to the cars. Nolan, after coupling the engine to the cars, climbed on the front end of the standing cars and Hemphill repeated the signal, Nolan relayed it to the engineer, and the train started westward pushed by the engine.

Nolan walked to the second car west from the engine and on to the south side of the roof thereof in order to better signal to the engineer. They ran a few car lengths when Nolan saw Conductor Toop's lantern lying south of the track, and gave a washout or emergency signal apprehending that something was wrong. The train stopped within a car length. Nolan got off and discovered Toops' arm, head and hat, also

his lantern and lead pencil, lying between it and the track, south of the track. Nolan's lantern had gone out in his rapid descent off of the car and he made a mark with his heel by the side of Toops' lantern and picked it up and looked for his body and found it lying under the engine in the position hereinbefore described. Blood was found on all of the cars except the first car on the west end of said string of 15 cars.

(m) There was a highway crossing which ran approximately north and south over all of the tracks at Rolla station, about 4 or 5 car lengths west of the depot, as shown by the evidence of Hepmhill and Nolan. Hemphill, while speaking of coupling up the stock cars and grain cars which were standing on the passing track north of the depot, said (R. 30): "There was one road crossing cut in the grain cars; otherwise they were coupled together." Nolan testified (R. 23): "There was a road crossing back there that was cut. There was another coupling back between the engine and the road crossing. The road crossing was west of the depot about 4 or 5 car lengths."

(n) There were no switch lights at Rolla station nor any yard limit signs (R. 37).

(o) There was no lighted lantern on top of those 15 grain cars. Hemphill testified (R. 38): "When I got up on top of those 15 grain cars there was nobody else on top so far as I saw. There wasn't any lantern there. If there had been a lantern up

there I would have seen it unless the person had it behind him or hid in some way. You could see anyone with a lighted lantern on top of any of those 15 cars."

Conductor Toops' Movements After He Had Coupled Up the Five Grain Cars to His Train on the Main Line.

(p) Conductor Toops remained on the station platform going through his switch list after he had coupled up the 5 grain cars above mentioned. Mr. Nolan, the head brakeman, saw Toops on the platform at the time the 27 stock cars and grain cars were pulled out on the main line over the cross-over switch (R. 24). Hemphill, the rear brakeman, saw Toops on the east end of the platform with his lantern on a truck and his train book in his hand, looking through his switch list (R. 35).

The derail on the elevator track where Toops' body was afterwards found, is about 300 feet east of the depot. There is a path on the south side of the main line eastward from the depot. The elevator track at the derail is skeletonized. Mr. Bryan, witness for the respondent, testified (R. 81) that there was possibly a gallon of dirt between the ties. Thistles and weeds had grown up between the ties at that place and obscured the real condition of the track.

Dr. H. J. Duvall testified (R. 56):

"I am a practicing physician. Have been for thirty-one years. In a crushing injury where a railroad car wheel or railroad engine mashes off a member, it mashes up the tissues so bad,

including the blood vessels, that there isn't any bleeding immediately following it, like there would be if it was cut off with a sharp instrument."

Company Rules for Switching Cars at Stations.

(q) A book of rules prepared by petitioner and issued to trainmen for their government in handling trains, was introduced in evidence. The definitions of "station" and "yard" were especially referred to in the evidence by petitioner, and read as follows (R. 28):

> "Station—A place designated on the time-table by name, at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated.
>
> "Yard—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by timetable, or by train order, may be made, subject to prescribed signals and regulations."

The undisputed evidence showed that Rolla is a station and comes under the first definition given above.

Conductor's Duty at Stations.

(r) The following rules defining the duties of conductors at stations and especially referred to at the trial, read as follows (R. 84-85):

> "Rule 381. Conductors of freight trains are required to do their work thoroughly at stations, bearing in mind that trains are run to do the business of the road and not merely to make time over it. Trains, however, are expected to run with regularity and as nearly on time as the

prompt performance of work and rules will permit.

"Rule 396. They must do such switching as shall be necessary in taking cars for their own trains or in leaving cars from the same. Local freight trains are generally to do necessary switching at stations, but any freight train may, in case of necessity, be called upon by station agents to do such work, and the same will be performed. Conductors when at stations doing work will attend personally to the switching unless engaged in checking the unloading way-freight as provided in Rule 389, when they may allow brakeman, if competent, to do the switching.

"Rule 398. When cars are taken on at intermediate stations, they must be carefully examined. They must see that cars already on sidings, as well as those set out by them, are safely and properly left. Cars or engines must always clear the main or other adjoining tracks a safe distance.

"Rule 471. They must know (so far as possible) that switches are right before attempting to pass or use them, and particularly acquaint themselves with location of derailing switches and know they are right before attempting to pass them.

"Rule 483. They will take into consideration that the lives of passengers and trainmen, as well as the property of the company, are entrusted to their care, and it is fully expected and required that they will not only attend to all signals and instructions, but also that they will, on all occasions, be vigilant and cautious themselves, not trusting alone to signals or rules for safety. Whenever it becomes necessary to protect rear or train engineman will promptly signal flagman as per Rule 14 c."

(s) The following are the company's rules to be observed by trainmen in stations while switching and moving cars in such stations, to-wit (R. 51):

"Sec. 102. When cars are pushed by an engine (except when shifting in making up trains in yards) a flagman must take a conspicuous position on the front of the leading car and signal the enginemen in case of need.

"Sec. 320. Trainmen and yardmen, before switching or moving cars at stations, must ascertain that there are no persons or property on or about the same that might be injured or damaged by so going.

"Sec. 473. They will, in rounding all curves where the view is obscured, sound the whistle, using the signal prescribed in Rule 14 (Rule 14 provides for two distinct whistles). .

"Sec. 478. They will use great care in backing up to take a train, or backing into a siding to take or leave cars, and will approach so slowly that couplings can be made without injury to persons or property.

"Sec. 24. When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

ARGUMENT.

The foregoing statement of facts is practically the same as the statement of facts set out in Respondent's Brief in Opposition to the Petition for Writ of Certiorari, and differs only in this, that we have eliminated the arguments set out on pages 12 and 13 which were incorporated in said statement of facts. Respondent, still relying upon the argument made in her Brief in Opposition to the Petition for Writ of Certiorari and the cases cited therein, submits for the consideration of the court the following additional argument in reply to the two points raised by the petitioner in its final brief (p. 13) namely:

> First: "That the negligent acts found by the jury in the original trial of this case were not shown to be the proximate cause of the death of Toops. In other words, admitting that the company was guilty of the acts found by the jury, and that those acts were negligent, yet there is no evidence that such negligent acts were the cause of Toops' death."
>
> Second: "It is the contention of petitioner that under the decisions of this court and of the Federal courts generally, the acts complained of and found by the jury were not negligent acts as a matter of law."

Both of the questions raised by the petitioner may well be argued together. A careful reading of the testimony in this case shows that the petitioner was guilty of actionable negligence, and that the general verdict of the jury and its special findings in favor of the re-

spondent were properly sustained by the Supreme Court of Kansas. The acts of negligence committed by the petitioner as shown by the evidence, may be briefly stated as follows:

First, the kick-in of 15 grain cars with no one on them to control them or stop them in case of danger.

Second, no light was on the front end of the moving cars.

Third, no kick-in or push signal was given by the engineer by blowing the whistle.

Fourth, the bell was not rung as a warning to any person who might be upon the elevator track.

Fifth, the track was defective at the derail where Conductor Toops was killed, in this, that the ties were practically without ballast or dirt filling between them, and weeds and thistles had grown up between the ties and about the track. It was a skeletonized track and so dangerous as to require extraordinary care for any trainman or other person to cross it without accident on a dark night.

Sixth, the elevator track curved from the main line in a southwesterly direction around a high bank, which was about 8 or 10 feet high (see photographs, Record 85 and 86). Special reference to Exhibit 5, (Record 86), looking westward down the main line track, shows the height of the bank as compared with the depot and elevators on the south side, and gives a clear idea of the extent of the curve of the track from the main line to the elevators. It also shows the depth of the cut through which the main line and passing track

run, there being a white fence on the right (north) side of the track.

Seventh, Conductor Toops, as we have seen, saw this track by the aid of the light from his lantern for the first time in thirteen years.

A reading of the record and our statement of facts shows that the 15 grain cars to be placed on the elevator track were west of the stock cars on the passing track which was north of the main line track running east and west through Rolla. When the 12 stock cars were coupled onto the 15 grain cars, the 27 cars were pulled out onto the main line track to the eastward. Hemphill, the rear brakeman, lined the switch after the train had cleared the switch on the main line track. He then gave a "kick-in" signal. The first kick-in signal, as we have seen, was not obeyed and a second trial was had which resulted successfully. The west end of the cars moving to the westward had to roll past Hemphill, the rear brakeman. Hemphill and Nolan were both operating on the south side of the train and next to the high bank on the south side of the main line. It would have been an easy matter for Hemphill to have gotten on to the rear car, and we strenuously contend that he should have done so for the purpose of riding the 15 grain cars on to the elevator switch. By so doing he would have complied with the rules of the company as hereinbefore referred to, and if he had done so, there can be no question but what Conductor Toops would have seen his lantern on the end of the car and his life would have been saved. The evidence established no custom abrogating

the rules. However, Hemphill waited for the entire cut of 15 grain cars to pass on beyond him and on to the elevator track, then turned the switch and gave a signal for the 12 stock cars next to the engine to be kicked over the cross-over track onto the passing track. That movement was successfully accomplished.

We wish to call the court's special attention to the fact that there was no necessity for kicking the 15 grain cars on to the elevator track. The safest plan to have pursued under the circumstances was for the engine to have pushed the whole train down the main line and on to the elevator track with Hemphill, the rear brakeman, on the west and moving end of same with his lantern. If this had been done Toops would have been warned of their approach and his life would have been saved; the grain cars would have been placed at the elevators for loading, and the 12 stock cars cut off from them and taken by Nolan and Hemphill back down the main line track and from thence over the cross-over switch on to the passing track. The last method would have taken but little more time than the movement of the cars on the kick-in signal and would have been in full compliance with the rules. In this connection we call the court's attention to the testimony of Mr. Nolan, the head brakeman (R. 22) as follows:

> "The first thing we did was to take the engine and the four cars which we picked up at Wilburton and went in on the elevator track and got five loads of grain which were billed out, and came back to the main track, and Conductor Toops made the coupling. The next thing that was done was to cut off the engine and went east on the main line to the east end of the stock track."

If it was the custom of the two brakemen to kick in cars in order to save time, when the five loads of grain and the four cars in front of them, making nine cars in all, were brought back on the main line track to be attached to the train standing on the main line, they would have been kicked in; but instead of that they were pushed in with the engine and the coupling made by Conductor Toops. This movement was done in accordance with the rules. There was no evidence introduced showing that the "kick-in" was used by this crew at any station from Dodge City to Elkhart or from Elkhart through Wilburton to Rolla; and no evidence whatever, as we have heretofore observed, showed that Conductor Toops had any knowledge of such a custom in violation of the rules.

However, inasmuch as the 15 grain cars were kicked in on to the elevator track, it was the duty of the rear brakeman, Hemphill, to have gotten on to the west end of the leading car and ridden them in and on to the elevator track. He was in a position to do that when the kick-in was made and knew the rules required it. When the leading car was passing him he should have swung on to the ladder on the south side of the west end thereof and climbed to the top of the car and taken his position at the brake on the west end thereof, where he could have warned Conductor Toops, by means of his white light, of their approach. It goes without saying that if he had complied with the rules he would have been in position to have applied the brake when he saw Toops was in danger, and have prevented the accident. In this connection we call

attention to the following excerpt from the opinion of Mr. Justice Burch (R. 107):

> "Conductor Toops knew perfectly well that no brakeman with a light would be on the end grain car to show him the string of cars was coming, because he planned the work so his brakemen would of necessity be otherwise employed, and in planning the work he was the company."

This statement has no evidence whatever to support it. There is not a scintilla of evidence to show that Conductor Toops had any knowledge that the rules applying to switching at stations would be violated, or of any custom abrogating the rules. There was no such custom. There was an attempt on the part of petitioner to establish such a custom, but it failed. Engineer Hall testified in substance that it was the usual practice for the engineer to give a kick-in signal when he is starting up a train on a kick-in signal (R. 42); and J. B. Robinson, an employee of the petitioner, testified in substance (R. 82) that it was not the custom to back cars in where you can't see the end, without somebody to protect whoever might be on the track, whether there is a roadway there or not.

As to whether or not there was a custom was a question of fact for the jury, and the jury resolved it in favor of the respondent. No doubt Mr. Justice Burch overlooked this evidence when he wrote his dissenting opinion. If Hemphill had mounted the leading car of the 15 grain cars when they were kicked in on to the elevator track, the engine and 12 stock cars could have remained on the main line track until Hemphill returned and turned the switch connecting the main line

with the cross-over switch, and they could have been moved on to the passing track. It would not have taken more than 5 minutes for Hemphill to have made the return after he had ridden the grain cars to where they stopped on the elevator track. A car is approximately 42 feet long including the coupler (R. 29). The string of 15 grain cars, therefore, would have been 630 feet long. Under Army regulations, soldiers walk in common time at the rate of 128 steps to the minute, 28 inches to the step; and at that rate 2.71 minutes only would have been required for Hemphill to return to the cross-over switch on the main line—not very much additional time to have completed the work without accident. The fact is, the switching operations, after Hemphill and Toops were talking to each other before the 15 grain cars were moved off of the passing track to be switched in on to the elevator track, consumed not to exceed 15 minutes of time, as Mr. Hemphill testified (R. 40). He said:

> "It couldn't have been over fifteen minutes at the very outside. It couldn't have been over ten or fifteen minutes from the time I was talking to him until he was found under the car."

From this it would seem that Mr. Justice Burch overlooked the fact, in writing his dissenting opinion, that the time consumed in such switching operations in accordance with the rules, means a reasonable time; and also overlooked Rule 381 (R. 83) which reads:

> "Conductors of freight trains are required to do their work thoroughly at stations, bearing in mind that trains are run to do the business of the

road *and not merely to make time over it.* Trains, however, are expected to run with regularity and as nearly on time *as the prompt performance of work and rules will permit*" (our italics).

It follows that if Hemphill had ridden the grain cars to the point where they stopped and had gone back to the cross-over switch, the time consumed would still have been a reasonable time upon a fair construction of the rule above quoted.

Here we wish to say that there is no rule authorizing kick-in or flying switches at stations. Rule 102 (R. 51) reads as follows:

> "When cars are pushed by an engine (except when shifting in making up trains in yards) a flagman must take a conspicious position on the front of the leading car and signal the engineman in case of need."

This rule applies specifically to what we have just said. In this connection we desire also to call the court's attention to Rule 24, which reads as follows (R. 51):

> "When cars are pushed by an engine (except when shifting or making up trains in yards) a white light must be displayed on the front of the leading car by night."

We also wish to emphasize Rule 473 (R. 51) which reads:

> "They will, in rounding all curves where the view is obscured, sound the whistle, using the signal prescribed in Rule 14."

The evidence without contradiction showed that each one of the rules just quoted were violated by the

switching crew. We have seen from the evidence that Mr. Hall, the engineer, did not ring the bell or blow the whistle. Mr. Hall also testified (R. 42):

> *"I could not see a brakeman on the rear end of the cars* or down near the middle of that string of fifteen cars. From the engine cab I could not see anyone standing on the ground. There was an obstruction there in a bank, probably five or six feet high. I didn't see any lantern thrown out of any kind, I couldn't have seen it. It was a clear night, but dark. I knew Toops very well. His disposition was cheerful."

And on cross examination he said (R. 42):

> "I could not see the movement of the cars. I could see the lantern. If I had had a lantern I could have seen the movement of the cars possibly a short distance. I suppose you could see with a lantern when you were coming to a track."

Mr. Hall further said (R. 43):

> "There was a curve there that made it impossible to see around to the back end of the fifteen cars."

None of the above quoted rules were observed. From what we have said it will appear to the court that the conditions were such at Rolla station, with the curve in the track, the high bank, and it being impossible for the engineer as well as the two brakemen to see the end of the cars, that it was all the more necessary for these rules to be strictly complied with, especially as the night was dark and the cars could not be seen. The rules introduced in evidence in this case as well as the definitions of "station" and "yard" (R. 28) clearly defined the duties of the

switchmen and the engineer. These rules without a doubt were carefully compiled by the operating department of the Santa Fe Railway System, and it is a well known fact that such rules were adopted by the petitioner in order to reduce accidents on its line to a minimum. The slogan of "Safety First" is stressed by the Safety First Department of the entire Santa Fe System in accordance with Rule 483 (R. 84) which reads:

> "They will take into consideration that the lives of passengers and trainmen, as well as the property of the company, are entrusted to their care, *and it is fully expected and required that they will not only attend to all signals and instructions, but also that they will, on all occasions, be vigilant and cautious themselves, not trusting alone to signals or rules for safety.* When it becomes necessary to protect rear of train enginemen will promptly signal flagman as per Rule 14 (c)" (our italics).

This rule speaks for itself—it is an instruction —and the advice given therein by the operating department was entirely ignored with the result that Conductor Toops was killed.

There Was Ample Evidence to Warrant the Trial Court in Overruling the Petitioner's Demurrer to the Evidence and in Submitting the Case to the Jury; and That Being True, the Supreme Court Was Justified in Affirming the Judgment of the Lower Court.

The petitioner sought to overcome the force and effect of the respondent's testimony by endeavoring to establish a custom on the part of trainmen to do their work in the manner in which the work was done as

shown by the evidence in this case. However, upon this point there was a conflict of evidence, and even if we admit for the purposes of this argument that there was some evidence showing a custom which warranted the violation of the rules hereinbefore quoted, the jury decided that conflict of the evidence against the petitioner and in favor of the respondent. We quote from the evidence upon this crucial point as follows (R. 42):

Engineer Hall, among other things testified as follows:

> "It is usual for the engineer to give a signal when he is starting up a train on a kick signal."

This language is direct, specific and positive and annihilates petitioner's theory that it was not the custom to blow the whistle when a kick-in is to be made. Again Engineer Hall testified (R. 43):

> "There was a curve there that made it impossible to see around to the back end of the fifteen cars."

The evidence was undisputed that the whistle was not blown nor a signal of the kick-in made. The lantern signal given by Hemphill to the head brakeman and the engineer for the kick-in could not be seen by Mr. Toops at the derail where he was killed. Mr. Nolan, the head brakeman, testified upon this point as follows (R. 24):

> "There were no other lanterns visible to me as we kicked those cars except Mr. Hemphill's lantern, and it was purely by his lamp signals that I was working by, and I was unable to see Mr.

Toops on account of the curve there and the cars pointing on this elevator track, wouldn't make it possible for me to see him if he was around the curve. It would make it impossible for me to see further than just the main track switch on account of that 'L' and curve that is there. If he had been beyond that I couldn't have seen him from where I was working. Mr. Hemphill's kick-in signal could not have been seen from the derail to where Mr. Hemphill was standing. *The signal couldn't have been seen from the derail where Mr. Toops' body was found. It couldn't have been seen from there to the cross-over switch where Mr. Hemphill was passing the signal from.* There was no whistle given, and I don't believe the bell was rung" (our italics).

J. B. Robinson, one of the petitioner's witnesses, testified that it was not the custom to back cars in where you couldn't see the end, without somebody to protect whoever might be on the track. The following question was asked him, and answer given (R. 82):

"Q. It isn't the custom to back cars in where you can't see the end, without somebody to protect whoever might be on the track, whether there is a roadway there or not, is it?
A. No, sir; it isn't."

From the foregoing it will be seen that it was not the custom to kick cars in without the engineer giving the signal of a kick-in by whistle, nor was it the custom for the trainmen to back cars in where they could not see the end of the cars, without having a brakeman on the end thereof with a lighted lantern. Hence, we find that the argument of the petitioner that it was the custom to violate the rules, utterly fails.

No Eye Witness Saw Conductor Toops Killed, But There Are Several Physical Facts Which Show Conclusively How He Met His Death.

His body was found between the rails of the elevator track at the derail. His shoulders were upon, and jammed against, the derail, his body lying diagonally across the track between the rails, with his feet to the north and east toward the north rail.

His head and right arm were mashed off, and with his hat were lying south of the south rail of the elevator track near the derail.

His lantern and lead pencil were lying near together, south of the elevator track about two or three feet away from the south rail of the track, his lead pencil lying between his lantern and the south rail.

His train book was found lying in the center of the track between the rails, about 3 feet east of his body. The surface of the track between the rails showed clearly that the body was dragged westward two or three feet until his shoulders were jammed against the derail.

Three or four cars passed over his body and were standing west of the derail where they stopped from lack of momentum.

Conductor Toops was last seen before his death at the east end of the station platform. He was looking over his train book. Mr. Hemphill, the rear brakeman, said that at that time he was holding his train book in his hand. As to this fact Hemphill testified (R. 35):

> "As I rode by him that was the last time I saw him on the platform. I could see the bill book and he had it in his hand. He was leaning over it with his elbows on the truck."

Of course, no one saw Mr. Toops leave the end of the platform and go to the place where he was killed, but it is safe to say that he followed the path along the south side of the main line track and went until he was approximately opposite the derail, and then passed over to the elevator track to the point where he was killed. The track at the point where Toops was killed was skeletonized; that is, there was no ballast there and but very little dirt between the ties, as shown by the testimony (R. 50); and also that thistles and weeds had grown up between the ties; that Toops saw this track for the first time in 13 years. It goes without saying that as he approached the track and started to cross the same, he directed his attention to these ties in an endeavor to pass over the track without stepping between the ties or falling; that the attention he was required to give to his passage over the track, may have in part prevented him from seeing the unlighted and unprotected grain cars that were approaching him from the east until they were right on him. It was not easy to see moving objects by the light of a lantern on that night. Mr. Nolan testified relative to Conductor Toops' movement on that dark night as follows (R. 25):

> "I noticed him a couple of times while the couplings were being made, and I noticed two lanterns down there. I wouldn't have known one from another any more than watching the lanterns and knowing who came out at the rear end of the cut. It was a dark night. I couldn't see any surrounding objects where Mr. Toops and Mr. Hemphill were with their lanterns. I couldn't tell which was which. It was too dark."

This shows conclusively that unlighted objects a short distance away from the lantern were not visible to the naked eye, and if Hemphill, the rear brakeman, had been on the rear of the moving car with his lighted lantern, Toops could have seen it approaching the spot where he intended to cross the track and have guarded himself against the danger. Therefore, the finding of the jury that Toops could not see the approaching unlighted cars, was fully sustained by the evidence.

We contend that the only reasonable hypothesis that can be drawn from the established and undisputed physical facts is that Conductor Toops was struck by the west end of the moving cars; that when his left side was struck he dropped his train book, and his lantern and lead pencil were thrown south of the track. It would be but natural for the lantern and pencil, both having been without doubt in his right hand, to be thrown beyond the track inasmuch as the pencil fell between the lantern and the south rail of the track. Hemphill testified (R. 40): "I think Mr. Toops was righthanded." The fact that the body was dragged for a distance of two or three feet and the shoulders were jammed against the derail, shows conclusively that the first car in passing over his body dragged it into such a position as to throw his head and right arm over the south rail in such a manner as to cause the wheels to sever them from his body and at the same time to knock off his hat, which was found lying between the lantern and the pencil and the south side of the south rail. Whether or not there was blood on

the first car is of no consequence and can be accounted for by the testimony of Dr. Duvall alone, who testified (R. 56):

> "I am a practicing physician. Have been for thirty-one years. In a crushing injury where a railroad car wheel or railroad engine mashes off a member, it mashes up the tissues so bad, including the blood vessels, that there isn't any bleeding immediately following it, like there would be if it was cut off with a sharp instrument."

This evidence was not contradicted. We contend that these actual physical facts show with certainty that Conductor Toops was struck by the west end of the first car, knocked down and killed, and that no other reasonable hypothesis can be drawn from the evidence.

The fact that the track at the point where Conductor Toops was killed was skeletonized, as we have seen, and that its condition required greater care on the part of Conductor Toops in passing over the same than otherwise would have been required, coupled with the fact that it was difficult to see the outline of objects only a few feet away by lantern light, warranted the jury in making finding No. 10 which reads as follows (R. 82):

> "Q. No. 10. State fully in what the negligence of the defendant consisted, if any.
> A. No. 10. 1st, in not protecting rear end of 15 grain cars. 2nd, in engineer not sounding signal when starting to back cars around curve and through cut. 3rd, poor condition of track at derail switch."

Right here we wish to make this observation: That it is a matter of common knowledge that one who

is carrying a lantern on a dark night, when he looks up and around, can only see a very few feet away. Hence the reason for Rule 24 (R. 83) which reads as follows:

> "When cars are pushed by an engine (except when shifting or making up trains in yards), *a white light must be displayed on the front of the leading car by night*" (our italics).

If this rule had been complied with, Conductor Toops could have seen the white light on the end of the grain cars approaching him in time for him to have protected himself. This cannot be controverted.

The petitioner has attempted to elucidate a different theory as to how Toops met his death. On pages 17 and 18 of their brief, it is said:

> "The Supreme Court of Kansas, in the opinion written by Justice Hopkins, indicates that he could not have been attempting to get onto the cars because if he had been so doing his body would not have been found between the rails but would have been on the side of the track. This shows entire unfamiliarity with the structure and arrangement of the ladders on box cars. On every box car there is a ladder at each end on the side of the car, and in addition to these ladders on the side of the car there are also ladders on the end of the car, right around the corner from the side ladders, and it might very readily be that Toops caught onto the side ladder and swung around to the ladder on the end for the purpose of reaching the top of the car; and this would thoroughly explain how it was that he may have fallen and his body might have been found between the rails. *Of course, this is pure surmise, but it does not seem so improbable as the ex-*

planation given by the jury and approved by the trial court, and afterwards by the Supreme Court of Kansas" (our italics).

We wish to say that the illustration fails of its purpose and does not suggest a theory of the death that can be accepted as plausible in this case for the following reasons:

If Conductor Toops had met his death in the manner described by the petitioner, his train book would have been in his coat pocket, his lead pencil would have been in his vest pocket, and it would have been necessary for him to have carried his lantern on one arm; that is, with his arm thrust through the handle of the lantern which is made especially for that purpose so that trainmen can use both arms to swing onto a box car and climb to the top thereof. If Conductor Toops had gotten onto the ladder on the west end of the first car or the ladder upon the west end of the second car, *he could not have done so with his train book in one hand and his lantern and lead pencil in the other.* He would have had to have both hands free in order to get on the ladder on the side of the car, and certainly would have had to have both hands free in swinging from that ladder around the end of the car onto the ladder on the end of the car for the purpose of reaching the top of the car, as suggested by the petitioner in the foregoing quotation. Their theory is absolutely untenable. It follows that the physical facts established by the evidence without any contradiction, show conclusively and unerringly that Conductor Toops met his death by being struck

by the west end of the first car as found by the jury.

Petitioner complains at length that the distinction which Mr. Justice Hopkins drew between "stations" and railroad "yards" is untenable, and endeavors by its argument to convince the court that there is no difference. We wish to remark that it would be very difficult for counsel for the petitioner to convince the operating department of the petitioner that there is no distinction between stations and yards. The operating department intended there should be a distinction. Hence the reason for the adoption of the two definitions. It is plain to anyone not in the railroad service that there is a distinction. "Yard" is defined by the rules of the petitioner as follows (R. 28):

> "Yard—A system of tracks within defined limits provided for the making up of trains, storing of cars and other purposes, over which movements not authorized by time-table, or by train order, may be made, subject to prescribed signals and regulations."

If we apply our common knowledge to the interpretation of this rule, we know at once that the movements of engines and cars in yards in the making up of trains are made without any authorized time-table. A yard contains many different tracks and those tracks and are not only used for storage but for the switching about and making up of trains and the segregation of empty cars from loaded cars in transit. Such yards are usually constructed so that there is a slope from one end of the yards to the other in order that cars may be moved by gravity. It is a well known fact

that the yards established by the Santa Fe Railroad system are busy places and have more than one engine operating therein. In many cases several engines and switching crews are employed, and they are constantly moving cars backwards and forwards. It is patent that the ringing of bells and the blowing of whistles would tend to confuse as was held in *Arkfetz* v. *Humphrey,* 145 U. S. 418, quoted in *Toledo St. Louis & Western R. Co.* v. *Allen,* 276 U. S. 165 (Petitioner's Brief, 32). However, at a small station like Rolla where there was only one engine operating, there could have been no confusion. A "kick-in" whistle signal would have warned Conductor Toops that the 15 grain cars were being kicked in onto the elevator switch.

"Station" is defined as follows (R. 28):

> "Station—A place designated on the time-table by name, at which a train may stop for traffic; or to enter or leave the main track; or from which fixed signals are operated."

When this definition is compared with the definition of "yard," it will be seen at once that a station is a place *on the time-table* where a train may stop for traffic. It is a part of the railroad system through which movements are authorized and defined by time-table or by train order, and differs materially from yards where the movements of trains and cars are made when not authorized by time-table. The distinction is very clear and the operating department knew what it was about when it formulated the two definitions.

From what we have said it follows that the authorities cited by the petitioner in its brief from pages 29 to 37, are not in point. They do not apply in any sense to switching movements at stations but analyze cases where injuries were inflicted in the movement of cars and trains in *yards.*

The petitioner on page 27 of its brief, referred to the case of *C. M. & St. P. R. Co.* v. *Coogan,* 271 U. S. 472, and among other things said:

> "The Coogan case is the one particular case upon which petitioner relied in the trial of this case before the jury and also in its contention before the Supreme Court of Kansas. In that case at the close of the evidence the petitioner moved the court to direct a verdict in its favor on the ground, among others, that respondent had failed to prove any actionable negligence on the part of the petitioner, and that any verdict for respondent would be based upon speculation and conjecture, and in the decision this contention on the part of the petitioner was sustained."

A reading of this case shows that it is not an analogous case to the one at bar. There was only one act of negligence alleged and that act of negligence was not sufficiently proven. Consequently, the case was erroneously submitted to the jury. The evidence introduced still left the manner of death a speculation and conjecture. There were no physical facts or circumstances sufficient to sustain the verdict. However, in the case at bar, as we have seen from the foregoing argument, there was ample evidence upon

every point at issue, not only to show the negligence of the petitioner but a number of physical facts which showed unerringly how Conductor Toops met his death.

It will be noticed that the petitioner has quoted quite extensively from the Allen case, *supra*. The employee injured in the Allen case was a car checker and worked at regular hours in the yards; and the case is not analogous to the one at bar. We have studied this case carefully and it is easily distinguished from the instant case in many of its important phases. *First*, in the Allen case the accident happened in a busy yard, while in the instant case the accident happened at a way station. *Second*, Allen was a car checker and had been employed for about 18 months immediately previous to the accident, while here Toops had not been over these tracks for many years and had not worked on a freight crew for 4 or 5 years. *Third*, the court said in the Allen case (p. 171):

> "And there is no support for the assumption that plaintiff was without knowledge of the switching practice followed in that yard or that the movement in question created an unusual hazard."

In our case there is a complete lack of evidence that Toops was acquainted with any custom of "kicking" cars. The evidence that there was any such custom, was disputed, and certainly it remained for the jury to weigh the evidence. *Fourth*, the court said in the Allen case on page 171:

> "In any event plaintiff assumed the risk. He was familiar with the yard and the width of the

space between the tracks and knew that cars were liable to be shunted without warning to him. The dangers were obvious and must have been fully known and appreciated by him."

While in the instant case Conductor Toops was not familiar with the track where he was killed; he saw it by the light of his lantern for the first time in 13 years, immediately before he was killed. He did not know that his train crew would violate the rules. He had a right to believe and rely upon the rule requiring the engineer to give two blasts of the whistle as a kick-in signal when he started to kick in cars; and he had a right to rely upon the rule requiring a brakeman to take his position on the moving end of the kicked in cars, with a white light. He had a right to rely upon the rule that a white light would be on the end of the moving cars. He had a right to rely upon the fact that where there is a curve in the track and a high bank on the south side thereof, none of these rules would be violated, and that the moving end of the cars would be protected. Therefore, he could not be charged with knowledge that these violations of the rules would be made, and he assumed no such risks.

Fifth, in the Allen case, Allen was a car checker and not a member of the crew. In this case Toops was the conductor. The members of the crew are charged with a knowledge of the provisions in the rules, and that kicked-in cars at stations must be protected by a man or by a light. They knew they were strangers to Toops; they knew that he had to cross the elevator

tracks and that it was a place of danger; that it was his duty to inspect the derailer under rule No. 471 (R. 84), which reads as follows:

"They must know (so far as possible) that switches are right before attempting to pass or use them, and particularly acquaint themselves with location of *derailing switches* and know they are right before attempting to pass them."

As we have seen, no custom of kicking cars was proven and there is not a scintilla of evidence that Toops had ever heard of such a custom. So this crew knew that Toops was in a place of danger, or, in the exercise of any care at all, they should have known he was in peril. Neither the engineer nor the two brakemen could see Conductor Toops as he approached the track near the derailing switch on account of the curve in the elevator track and the high bank, as we have seen from the evidence. The train crew knew that he was not on top of the 15 cars because if he had at any time succeeded in getting on top of the 15 cars, his lantern would have been seen, as testified to by Hemphill (R. 38) who said:

"You could see anyone with a lighted lantern on top of any of those 15 cars."

This is additional evidence that Toops was never at any time on top of the 15 cars and therefore could not have fallen off of them onto the track.

It will be noted that the dissenting opinion was written by one justice. Two others dissented to the opinion of affirmance but they did concur in the dissenting opinion. Mr. Justice Burch labored under the

impression that because there were no eye witnesses the respondent could not recover because no one knew exactly how his death occurred. In the light of the evidence this was an erroneous conclusion on the part of Justice Burch. The physical facts shown by the evidence explained precisely how Toops met his death, and exclude surmise and conjecture. Our position is supported by the reasoning in *Kelly* v. *Union Pac. Ry. Co.*, 141 N. Y. App. 490, 125 S. W. 818, wherein the court stated the proposition as follows (p. 820):

> "The evidence leaves a possibility of the deceased's death resulting from circumstances or causes for which defendant would not be liable. But we think it showed sufficient facts and developed sufficient circumstances which united gave ample ground for the jury to say with reasonable certainty that the proximate cause of the death was defendant's negligence in leaving the wheelbarrow where it was. And reasonable certainty is all that is required. A possibility of a cause for which defendant would not be liable is not enough to outweigh a probability of such nature and carrying such strength as to produce reasonable certainty in the minds of a jury. A mere possibility will not justify a jury in finding a defendant innocent in a criminal prosecution. The fact that the catastrophe which happened to deceased was unseen will no more cut out a right to show by circumstances the cause of its occurring than would the unseen commission of a crime prevent conviction on circumstantial evidence. So after due consideration of the suggestions made by defendant as to the sufficiency of the evidence, we have concluded it was ample to sustain the verdict, and hence find there was no error in refusing the demurrer."

Under the facts in this case the question of negligence was properly submitted to the jury. In *Willever* v. *Delaware, L. & W. R. R. Co.,* 89 N. J. L. 697, 99 Atl. 321 (1916) rev'g 87 N. J. L. 348, 94 Atl. 595 (1915) (19 N. C. C. A. 483n.), which is a similar case to the one before the court now, section 1 of the syllabus reads as follows:

> "Where as a part of its operating system, a common carrier by railroad in interstate commerce has provided and notified its employees of a rule that in the 'movement of trains' when 'cars are pushed by an engine' a man shall take a 'conspicuous position on the front end of the leading car to signal the engineman in case of need,' and an employee so notified of the rule, who, in the performance of his duties, has, in reliance upon the rule, placed himself 200 feet in front of a long train of empty freight cars not being 'drilled,' and standing on a track not used for 'drilling' purposes, without engine or crew, is run down because a train crew attached an engine to the far end of the train, and without warning pushed it over him without a man being placed on the front end of the leading car in accordance with the rule, the question of the negligence of the train crew, the common carrier's employees, was properly left to the jury, citing *D'Agostino* v. *Pennsylvania R. R. Co.,* 72 N. J. L. 358, 60 Atl. 1113, and *Germanus* v. *Lehigh Valley R. R. Co.,* 74 N. J. L. 662, 67 Atl. 79."

The rules as to the conduct of a train crew in switching trains in yards, in the Willever case, are similar to the rules set forth in this case. Quoting from the opinion in the Willever case, *supra*:

> "The Rule No. 102 quoted above was contained in a book of rules under the subheading

'Movement of Trains.' Some witnesses testified that this book of rules was for the operating of trains out on the main line only and was not intended to apply to yard work. The evidence also showed that the book of rules was given to employees whose duties were exclusively within the yards as well as to employees who worked or ran trains on the main lines. Willever was furnished by the company with a copy of this book of rules. There was nothing in the book of rules to indicate that Rule No. 102 had no application to 'movement of trains' within yard limits, nor was there any evidence that Willever had ever been told that it did not so apply within those limits. The language of the rule itself is, 'When cars are pushed by an engine,' and the subdivision under which it occurs is headed, 'Movement of Trains.' * * * Turning now to the second point relied upon by the supreme court, it is said that Willever having received instruction and knowledge, as a section foreman for five years, that he must look out for his own safety, the defendant company, under the doctrine of assumption of risk, as applied in the case of *Precodnick* v. *Lehigh Valley Railroad Company, supra*, was, as to him, under no duty to give warning. We do not think the negligence of defendant's employees in failing to comply with the rule established for Willever's safety was one of the dangers he undertook to look out for, and therefore one of the risks he assumed. Obviously Willever's undertaking to look out for his own safety is, to a certain extent, a relative assumption, and therefore prescribed by the limit of dangers incident to his employment under the system established for the operation of the business. This is necessarily so."

The rule book furnished the Santa Fe employees contains Rule 102 in the identical words as Rule 102 in the Willever case with the exception of the addi-

tion of the words in parenthesis "except when shifting or making up trains *in yards.*" We believe that the addition of those words in parenthesis emphasizes and brings more forceably to the attention of trainmen and crew that when switching or making up trains in yards, the crew with which they are operating will not look out for them, that they must look out for themselves in the shifting or kicking in of cars without warning signal; but that when they are on the road and at stations or when shifting cars on tracks which are not in the yards, then they must give warning, and that negligence to do so by a member of the crew is not such a risk as is assumed by the other members.

The rules show that Rolla, Kansas was a station and not a yard. The crew at the time of Toop's death was not making up a train but was setting cars in on the elevator track for use by the elevators, and Rule 102 was in full force and effect.

In the case of *Chesapeake & O. R. Co.* v. *Proffitt*, 241 U. S. 462, 134 C. C. A. 37, 218 Fed. 23, the court had before it a case very similar to the one here. Proffitt, a brakeman, was injured when a collision took place caused by the yard crew who negligently and with undue violence (as the jury doubtlessly found) drove a cut of 29 cars into the standing cars upon which the plaintiff was working. There was some conflicting testimony as to whether or not any signal had been given and as to whether or not anyone was on the cars kicked in against the cars upon which Proffitt was working. In the opinion, page 465, the

court said in affirming the judgment of the circuit court of appeals:

> "Whether it was usual, in conducting such switching operations, to have a man at the forward end of the moving cut of cars, was in dispute. Plaintiff testified that 'it is the custom to have a man on the front end of a cut of cars that is being switched into other cars, who looks out for that and runs and stops the engine just before they get there, in making the coupling.' Two of the defendant's witnesses contradicted this; one in terms denying the custom of giving a warning as stated by the plaintiff; the other declaring that 'all the warning he knew of being given, or the practice, was for the men in and about the train to take care of themselves and see for his own danger when he attempts to do any work, and the witness knew of no signals given.' While another and experienced witness, called by the defendant, being asked if it was customary when running in a cut of cars to have a man on the front end with a light, replied: 'Well, on the yard in switching cars they come right down to the book rule. It says where cars are being shoved a man must be placed on the head car.' Whether there was a man at the forward end of the cut of cars that produced the collision in question was in controversy. As to plaintiff's opportunity to gain knowledge of the alleged custom, it did not distinctly appear that he had previously worked on a manifest train. He testified that he had been employed as a brakeman something more than five years, part of the time as an extra man and part of the time as a regular man; that he was an extra man when hurt; had been a regular brakeman until about three weeks before the accident, when he was 'pulled off the local freight.'
>
> "Plaintiff recovered a verdict for substantial damages, and the judgment was affirmed by the

circuit court of appeals (132 C. C. A. 37, 218 Fed. 23)."

In this case the petitioner has virtually admitted and does admit that the rules provided by the company were violated by the switch crew (the evidence shows this conclusively); that there was no man on the rear of the switched cars; that there was no light on the rear of the switched cars; and they admit that no warning, either by whistle or bell, was given by the train crew of the kicking in of the cars, and that the track was defective at the place of the accident.

Their petition for writ of certiorari is based upon the hypothesis that, granting all those acts of negligence, still there is no evidence that the death of Toops was caused by such acts of negligence. In other words, that they were not the proximate cause. It is our contention that whether or not they were the proximate cause of Toops' death were questions for the jury, quite properly submitted to the jury and having been so found by the jury, are conclusive. *Donegan* v. *Baltimore, etc., R. Co.*, (N. Y. 1908) 165 F. 869, 91 C. C. A. 555; *Erie R. Co.* v. *Schleenbaker*, 257 F. 667, 40 Sup. Ct. 13, 250 U. S. 666, 63 L. Ed. 1197; *Southern Pac. Co.* v. *Thomas*, 188 Pac. 268, 41 Sup. Ct. 447, 255 U. S. 576, 65 L. Ed. 793; *Davis* v. *Wolfe*, 44 Sup. Ct. 64, 263 U. S. 239, 241 S. W. 915, 294 Mo. 170; *Hughes* v. *Delaware, D. & W. R. R. Co.*, 233 Fed. 118.

This last cited case, *Hughes* v. *Delaware, D. & W. R. R. Co.*, 233 Fed. 118, is similar to this case in many

of its facts. It will be sufficient to quote a small part of it beginning on page 120:

> "It was claimed on the trial, and insisted, and the court submitted the question to the jury, that the defendant was negligent in backing this train on the passenger track, under the circumstances and in view of the surroundings and conditions, without having a light either on the side of the rear car nearest Hughes, or a man there with a light, and the jury found that it was negligence to move that train on the passenger track backward towards the switchman's shanty under the circumstances and surrounding conditions without such precaution, which was perfectly feasible. There was some evidence that this had been done on other occasions, one at least; but it is apparent to any intelligent man that a light could have been attached to one side of the rear end of this moving train—that is, the end nearest Hughes—or that a man taking hold of the grabiron and with his foot in the stirrup and holding a lantern could have seen the track for some little distance in front of the moving train as it proceeded towards the shanty. I think the case was properly submitted to the jury, and that the evidence presented a question of fact for the jury to determine, and that the verdict should not be disturbed.
>
> "*Southern Railway Co.* v. *Smith*, (C. C. A. 6th Circuit) 205 Fed. 360, 123 C. C. A. 488, is a case closely in point. It is there held:
>
> > 'While it is primarily the duty of a switchman in railroad yards to be on the lookout and keep out of the way of moving engines, there is a concurrent or secondary duty, independent of statute or rule, on the part of those in charge of such moving engines, to keep such lookout as is reasonably necessary to avoid injury to an employee who may neglect to protect himself, and the extent

of such duty is measured by the peculiar circumstances of the case.

'While plaintiff's intestate, who was a switchman in defendant's railroad yards, was walking along a track in the yards at night, he was overtaken and killed by an engine which was "drifting" or moving slowly behind him on the track, making very little noise. Its headlight was dim, and rendered more so by the electric yard lights, and there was a train passing on an adjoining track, which covered what noise the engine made. It could have been stopped within 10 feet, but the engineer did not see deceased. Held, that the facts tended to show that the engineer was negligent, and his negligence had a causal relation to the injury, and that a verdict for plaintiff was supported by the evidence.'

* * * * *

"The jury well may have found that to move these cars by backing down on the passenger track, under such conditions and surroundings, in the darkness, with no light at all at that end of the train, and only a man with a lantern on top of the car, was negligence. It was, of course, the duty of the defendant and of those moving these cars to keep such lookout as was reasonably necessary to avoid doing injury to an employee who under the circumstances might have neglected to fully protect and care for himself. The extent of the duty depended on the circumstances of the case, and the question was in my judgment one for the jury to determine."

If by any stretch of the imagination the petitioner could persuade this court that Rolla was a yard and not a station, then it would still have to contend with the undisputed fact that Conductor Toops was an utter stranger both to the tracks at Rolla, Kansas, to the

crew, and to their method of conducting switching operations. Mr. Toops had been in the employ of the Santa Fe for a good many years but had not been over this branch line for 13 years. He had been employed in the passenger service for the four or five years immediately preceding the accident. He had never seen either of the brakemen and was but slightly acquainted with the engineer and the fireman. There was some testimony of a custom of kicking cars without warning, but there was also the testimony of the engineer, Robinson (R. 82), that "it was not the custom to back cars where you could not see the end, without somebody to protect whoever might be on the track, whether there is a roadway or not"; and Engineer Hall testified (R. 42), "It is usual for the engineer to give a signal when he is starting up a train on a kick signal." So it would still be a question for the jury as to whether or not there was such a custom. In addition to that there is the silence of the entire record as to whether or not Toops knew of such a custom; and if he did not know of such a custom, then he could not be charged with negligence for not observing it. No one told him about such a custom; in fact, there was no such custom proven. Toops did not assume the risks of the defective track nor the negligent operation of the train.

39 C. J. 692, Paragraph 986, states the substantive law on the assumption of risk. It is as follows:

> "Risks which arise from the negligence of the master or those representing him are not 'ordinary risks' incident to the employment, but are 'extraordinary risks.' Hence, under the general

rule as to extraordinary risks, but subject to the limitations hereinafter considered, risks which result from the negligence of the master, that is to say, those risks which are avoidable by reasonable care on his part, are not assumed by the servant. The master, in the proper performance of his duties as such, is bound to exercise care and prudence to prevent his employees from being subjected to unreasonable risks or dangers, and to agree by implication of law not to subject a servant employed by him to extraordinary or unusual perils, and the servant has the right to assume that the master will perform his duty in this respect, except to the extent that the rule may be modified as to risks that are so open and obvious that a man of ordinary prudence would see and appreciate them; and it is very generally declared that the risk assumed commences only after the master has exercised due care in the performance of the duties which the law casts upon him."

18 R. C. L., Master and Servant, paragraphs 167 and 168, reads as follows:

"Risks 'Assumed'; 'Ordinary' Perils of Employment—The dangers in respect of which there can be no recovery for injuries by virtue of the doctrine of assumption of risk include but according to the generally accepted statement do not extend beyond the 'ordinary' risks of the employment or such as are 'incident' thereto. And the 'ordinary' risks incident to the service are those perils of which employees have notice or which are patent and obvious to them. To risks which arise after the commencement of employment, as well as to those contemplated when the service began, the doctrine of assumption of risk applies, but a change of appliances of which an employee has no knowledge or notice is not a risk which he assumed.

"Employer's Negligence as Included among Risks 'Assumed.'—A topic that has given rise to much comment and not a little confusion is whether the employee 'assumes the risk of the employer's negligence.' A note of indefiniteness is noticeable in many of the expressions, and some statements are quite unintelligible. It is generally asserted without qualification that the employee does not assume the risk of the employer's negligence, but just what conception is embodied by this expression is not directly explained. It is reasonably certain, however, that what is meant is that the employee is not barred of recovery for injuries due to perils of which he has no knowledge and appreciation. It must be constantly borne in mind that liability is to be determined with a view to the comparative knowledge of the parties. Primarily the employer is bound to provide for the safety of his employees, and the employees have a right to rely upon the performance of this duty. They are not barred of recovery for injuries—or in the terminology of the present topic they do not 'assume the risk'—occasioned by the failure of the employer to perform his primary duty, unless they have actual or constructive knowledge of the dereliction and of the perils arising therefrom, and continue in the employment without protest or complaint. The principle, it will be noted, is that of contributory negligence. So the employee does assume the risk of the employer's negligence when the fact of such negligence is known and the danger therefrom appreciated by him. Under the rule of the common law the employer virtually may conduct his business according to his own ideas, although another method would be less dangerous, and if his employee knows the hazards incident to the business in the manner in which it is carried on, and continues in the employment, he 'assumes the risks' of the more dangerous method. Accordingly, if the employer furnishes his employee with a tool, apparatus or machine that

is not reasonably safe, and the employee proceeds with the work with the full knowledge of the defect and danger, there can be no recovery in case of a resulting injury; for, it is said, the employee 'assumed the risk.' Again, if the employee consents to occupy the place assigned him in which to work, and to incur all the dangers incident thereto, having sufficient intelligence and experience to enable him to comprehend such dangers, his assent dispenses with the performance of the employer's duty to furnish him with a safe place in which to work."

The case of *C. R. I. & P. R. R. Co.* v. *Ward*, 252 U. S. 18, is a case very much in point here. In that case Ward, a switchman, was thrown from the top of a box car upon which he was about to apply the brake. There was no question of the insufficiency of the equipment. The only question was the contributory negligence of his fellow servants and assumption of risk. The court said on page 21:

"As to the nature of the risk assumed by an employee in actions brought under the Employers' Liability Act, we took occasion to say in *Chesapeake & O. R. Co.* v. *DeAtley*, 241 U. S. 310, 315, 60 L. ed. 1016, 1020, 36 Sup. Ct. Rep. 564: 'According to our decisions, *the settled rule is not that it is the duty of an employee* to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, *but that the employee may assume that the employer or his agents have exercised proper care* with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them.' The Federal Em-

ployers' Liability Act places a co-employee's negligence, when it is the ground of the action, in the same relation as that of the employer upon the matter of assumption of risk. 241 U. S. 313. See also *Chesapeake & O. R. Co.* v. *Proffitt*, 241 U. S. 462, 468, 50 L. ed. 1102, 1106, 36 Sup. Ct. Rep. 620; *Erie R. Co.* v. *Purucker*, 244 U. S. 320, 61 L. ed. 1166, 37 Sup. Ct. Rep. 629.

"Applying the principles settled by these decisions to the facts in this case, the testimony shows that Ward had neither warning nor opportunity to judge of the danger to which he was exposed by the failure of the engine foreman to cut off the cars. In the absence of notice to the contrary, and the record shows none, Ward had the right to act upon the belief that the usual method would be followed and the cars cut off at the proper time by the engine foreman, so that he might safely proceed to perform his duty as a switchman by setting the brake to check the cars which should have been detached. For the lack of proper care on the part of the representative of the railway company while Ward was in the performance of his duty, he was suddenly precipitated from the front end of the car by the abrupt checking resulting from the failure to make the disconnection. This situation did not make the doctrine of assumed risk a defense to an action for damages because of the negligent manner of operation which resulted in Ward's injury, and the part of the charge complained of, though inaccurate, could have worked no harm to the petitioners. It was a sudden emergency, brought about by the negligent operation of that particular cut of cars, and not a condition of danger, resulting from the master's or his representatives' negligence, so obvious that an ordinarily prudent person in the situation in which Ward was placed, had opportunity to know and appreciate it, and thereby assumed the risk" (our italics).

Another case in which both the question of assumption of risk and defective appliances were at issue, is that of *Gila Valley, G. & N. R. Co.* v. *Hall*, 232 U. S. 94. In that case Hall recovered judgment for injuries sustained by him in the wreck of a three-wheeled gasoline velocipede which had a defective wheel. On page 100 of the decision the supreme court indulges in some presumptions and inferences which are infinitely more far-fetched than would be any presumption or inference in the instant case. On the question of the assumption of risk, the court said, page 101:

> "'The true test is not in the exercise of ordinary care to discover dangers, by the employee, but whether the defect is known or plainly observable by him. An employee is not charged by law with the assumption of a risk arising out of defective appliances provided by his employer, unless his employment was of such a nature as to bring to his attention and cause him to realize and comprehend the dangers incident to the use of such appliances.' This, we think, was a correct instruction under the circumstances of the case. An employee assumes the risk of dangers normally incident to the occupation in which he voluntarily engages, so far as these are not attributable to the employer's negligence. But the employee has a right to assume that his employer has exercised proper care with respect to providing a safe place of work, and is not to be treated as assuming the risk arising from a defect that is attributable to the employer's negligence unless the employee becomes aware of such defect, or unless it is so plainly observable that he may be presumed to have known of it. Moreover, in order to charge an employee with the assumption of a risk attributable to a defect due to the employer's negligence it must appear not only that he knew (or is pre-

sumed to have known) of the defect, but that he knew it endangered his safety; or else such danger must have been so obvious that an ordinarily prudent person, under the circumstances, would have appreciated it. *Union P. R. Co.* v. *O'Brien,* 161 U. S. 451, 457, 40 L. ed. 766, 770, 16 Sup. Ct. Rep. 618; *Texas & P. R. Co.* v. *Archibald,* 170 U. S. 665, 671, 42 L. ed. 1188, 1191, 18 Sup. Ct. Rep. 777; *Choctaw, O. & G. R. Co.* v. *McDade,* 191 U. S. 64, 68, 48 L. ed. 96, 100, 24 Sup. Ct. Rep. 24; *Texas & P. R. Co.* v. *Swearinger,* 196 U. S. 51, 62, 49 L. ed. 382, 387, 25 Sup. Ct. Rep. 164, 17 Am. Neg. Rep. 422; *Burns* v. *Delaware & A. Teleg. & Teleph. Co.,* 70 N. J. L. 745, 752, 67 L. R. A. 956, 59 Atl. 220, 592, 17 Am. Neg. Rep. 673."

The case of *Illinois Cent. R. Co.* v. *Norris,* 245 Fed. Rep. 926, is a case which arose in the State of Illinois and was taken on error to the District Court of the United States for the Eastern District of Illinois. Norris was killed while in the act of coupling up two cars. The engineer testified that he received the signal to back up; that shortly before he received the signal, he saw on the same side of the train, two lanterns, one of which he believed was carried by the brakeman, and one by the conductor. The conductor testified that he did not know where Norris was nor did he see him or his lantern shortly before he gave the signal to back up; that he did not know nor was it his duty to find out Norris' exact position before giving the signal to back up.

We quote now from the court's opinion on page 929:

"Defendant further contends that the evidence, viewed most favorably to the plaintiff, fails

to support a verdict against it, and that the motion to direct the verdict for the defendant should have been granted. The alleged negligence of the defendant was based upon the action of the conductor in directing the engineer to back up the train when Norris was between the cars and subject to be injured by any sudden and unexpected movement of the cars. It appears from the testimony of the engineer that, immediately before receiving this signal to back up, he looked out of the cab window and saw upon the same side of the train, lights from two different lanterns, and it is well nigh impossible to conclude that these two lanterns were held by any one other than the conductor and the brakeman, Norris. It is therefore contended by the plaintiff, that the brakeman being between the conductor and the engineer shortly before the signal to back was given and he having disappeared at the time the signal was given, the conductor was negligent in directing a movement of the train which was necessarily fraught with such danger to the life of the brakeman.

"Defendant contends that, notwithstanding this evidence, it was free from neglect, because of the testimony of the conductor to the effect that he did not see the brakeman and that, it was not his duty to locate him before giving the signal. We cannot accept the defendant's contention, notwithstanding the conductor's statement that each employee looked out for himself, and that it was not customary for a conductor to ascertain where his men were before he gave a signal. We are convinced that the evidence warranted the jury in finding the conductor negligent upon the facts disclosed by the testimony in this case. The testimony justified the jury in finding that the conductor had good reason to believe the brakeman was between the cars. It was the brakeman's duty to go between the cars and release angle cocks and shut off the air in switching cars.

"Where the brakes are operated by air, it is necessary for the brakeman or conductor to 'cut the line' as well as to uncouple the cars. Norris had been constantly so engaged to the knowledge of the conductor. He was supplied with a lantern. Both men were busily engaged in a common task, and were only a short distance apart. If Norris' lantern was not in sight, the conductor had good reasons to believe that he was between the cars. The conductor, on cross examination, admitted that it was the duty of each of them (the conductor and the brakeman) 'to look out for each other as much as possible.' We conclude that the jury was amply justified from all the evidence in finding the conductor guilty of negligence in the respect claimed by the plaintiff.

"Nor did the deceased assume the risk of such signal being carelessly given. We may well accept the statement that each employee in switching operations, was to look out for himself, and yet a brakeman could not be said to have assumed the risk arising from the negligent conduct of the conductor. The brakeman was not chargeable with notice that his fellow employee would violate a rule or a custom. He had reason to believe the conductor would not move the train while he was between the cars. If, as the conductor said, it was his duty to look out for the brakeman as much as possible, the brakeman had a right to assume that such duty would not be violated. *We conclude no error was committed in submitting both the questions of the defendant's negligence and the deceased's assumption of risk to the jury*" (our italics).

You will note the circumstances in the above quotation in the third paragraph where the conductor on cross examination said it was the duty of trainmen "to look out for each other as much as possible." In this case we do not have the direct evidence that it

was their duty to look out for each other as much as possible, but we do have the evidence of Mr. Nolan that he had been trying to locate Mr. Toops' lantern (R. 26), and also the evidence of Mr. Hemphill that when the engineer stopped he thought it was because they had gotten out of sight and the engineer had stopped for a signal, and he gave him a back up signal before he discovered that something had happened (R. 37). So we believe that we are safe in saying that it is the duty of members of a railroad crew to look out for each other as much as possible. That is common sense. Surely railroad men must work together. They are none of them a law unto themselves. The engineer must back on signal and the signal must come from the brakeman. Surely one brakeman doesn't just decide that they are going to back up and give the signal. They must work together. In this case they didn't work with Mr. Toops. They forgot all about him. They knew what his duties were—that he should cross the track and assist in the switching. He had a bright lantern, easily visible. There was nothing on earth but the cars upon which they were working to obstruct the view of his lantern, and if they didn't see his lantern they should have known he was in a place of danger and should not have given the back up signal without knowing where he was or without giving some warning signal that they were about to back the cars without anyone on them and without a light being on them. Surely he was entitled to that whether the track was good or not and whether he was a stranger to this territory or not, and the fact that the track was defective and negligently constructed,

and so found by the jury, and the fact that he had not been down there for fifteen yars, that he didn't know the location of the tracks other than approximately, that he did not know the switch crew nor their method of switching and that there were no switch lights, was all the more reason why they should have fulfilled to the letter the rules and regulations prescribed by the company, or have given him some warning or have instructed him as to the custom of this crew.

The case of *Central R. Co. of New Jersey* v. *Colasurdo,* 192 Fed. Rep. 901, was another case in which the injury was occasioned by the kicking in without warning of unlighted cars. Two people were injured in this accident, one was killed and Colasurdo lost his leg and filed this action. The plaintiff and two others were repairing a switch in the Jersey City yard. Shortly before the accident occurred a train of four cars arrived at the station and after discharging its passengers the four cars were kicked back to the station platform for reloading. They had no motive power and were controlled only by their own brakes. Quoting now from this case on page 902:

> "There was testimony from which the jury may have found that this train was not lighted and was running at the rate of ten miles an hour in charge of a single brakeman, that no signal or warning of its approach was given and that the brakes were not applied until the train was but six or eight feet distant. There can be no question that the three men, all of them experienced railroad men, were taken by surprise. Nighland was killed, the plaintiff lost his leg and Saldero escaped. If the testimony of the witness Gallagher be true, it

seems incredible that some one of the three did not hear his shouts and whistles or see the lights on the platform of the advancing car. The fact that two of the men were run down is persuasive testimony that the car approached them silently and unseen.

"We cannot believe that the risk of being injured in this manner while engaged in discharging his duty, was assumed by the plaintiff. He assumed the usual and ordinary risks of the calling, but when ordered to repair a track at night he had a right to assume that some precaution would be taken to guard him against extraordinary danger. If a watchman were not stationed to warn him of the approach of trains, he at least had a right to expect that a train would not back down upon him with no notice of its approach and no attempt to apply the brakes until only eight feet distant.

"We have no doubt, if the federal liability act is applicable, that a cause of action was established, for under it contributory negligence is no defense and the defendant is liable for the negligence of its employees Nighland and Gallagher."

We think it is proper for us to call the attention of this court to the decisions of the Kansas Supreme Court in cases of this character. The case of *McMullen* v. *Railway Co.*, 107 Kan. 274, is practically on all fours with the case at bar. About the only difference we can find is that in the McMullen case *the accident happened in a yard* while in this case the accident happened *at a way station.* The reasoning in this case, we believe, will commend itself highly to this court. A brief statement of the facts in the McMullen case is that McMullen was a brakeman for the Santa Fe and was working in the yards at Emporia, Kansas, helping make up a freight train. It was his duty, when the train was made up, to go to the rear end of the

train and close the stop cock and couple up the air hose. The evidence showed that it was customary for trainmen in making up trains in yards to have recourse to the method of kicking in cars. McMullen knew of this action. He was found dead. No one *saw the accident.* The jury found the train crew guilty of negligence. A verdict was rendered for plaintiff and affirmed by this court. *It was a no-eye-witness case.* The law is that Mr. Toops was presumed to be exercising reasonable care, and there is absolutely no testimony to the contrary. He was presumed to be in the line of his duty and we have shown that the line of his duty would require him to be in the position where he was found, at sometime or other. So we believe the presumption is fully carried out that he was in the line of his duty. We quote from the McMullen case, page 280:

> "Counsel for the defendant in their brief say: 'There was no eyewitness to the accident nor was there any testimony as to how it occurred. It may be assumed, however, that very shortly after the conductor and brakeman left the way car, he left the car and closed the angle cock and at that time the cars were kicked in on track 4, and by the impact, while he was between the rails on track 4, and at the rear end of the way car, was knocked down and run over. This assumption is based entirely on the situation appearing after the accident. * * * The duty of the conductor and brakeman of the train crew was to examine the seals and check the cars in the train, and that of McMullen was to close the angle cock, hang up the tail hose, and couple up the air hose on the train. This was usually done after the train was made up and just before or after the road engine

was attached to the train. Although, from what he told Dr. Eckdall, it was not the proper time to do so, he thought it had to be done and he would perform that duty while the train was being made up.'

"From all this testimony and the rules of the company referred to, and the condition of affairs assumed by counsel for defendant, it seems unreasonable to hold that McMullen was not engaged in the performance of his duty when injured, or that he was not located and engaged as the switch crew knew he or some other brakeman ought to be.

"While it may not have been the duty of the switch crew to keep a lookout under ordinary circumstances for a member of the train crew attending to the air couplings, the violent collision caused by the wrong signal and its effects were such as to make it a question for the jury whether such operations were negligent or not (*Sarr* v. *Railway Co.*, 97 Kan. 441, 155 Pac. 954).

"But it is urged that the negligence on which the jury based the verdict was other than that alleged in the petition. We hold, however, the charge that the switch engine and cars were shoved at a dangerous rate of speed and run with great force and violence without warning against the other cars of the train causing the way car suddenly and violently to move backwards over the body of McMullen, fairly includes the cause of such alleged violence, which was the transmission of the wrong signal (*Linker* v. *Railroad Co.*, 82 Kan. 580, 109 Pac. 678).

"It is also urged that the deceased assumed the risk, thereby exonerating the defendant. In *Spinden* v. *Railway Co.*, 95 Kan. 474, 148 Pac. 747, we held that in an action under the Federal Employer's Liability Act it was error to instruct that the assumption of risk could only be established by showing that its danger was so glaring that a person of ordinary prudence would not have at-

tempted it. In the opinion it was said: 'The employee is not regarded as assuming unknown or unappreciated risks from his employer's neglect, unless they are so obvious that an ordinarily prudent person would observe and appreciate them' (p. 476).

"The Federal Supreme Court, in *Seaboard Air Line* v. *Horton*, 233 U. S. 492, held that Congress in enacting this legislation based the action upon negligence only, and excluded responsibility of the carrier to its employees for defects not attributable to negligence. Touching risks not naturally incident to the occupation it was: 'These the employee is not treated as assuming until he becomes aware of the defect or disrepair and of the risk arising from it, unless defect and risk alike are so obvious that an ordinarily prudent person under the circumstances would have observed and appreciated them' (p. 504).

"The same court, in *Reese* v. *Phila. & Reading Ry.*, 239 U. S. 463, held that a railroad is bound to exercise under the circumstances the care towards its employees 'which the exigency reasonably demands in furnishing proper roadbed, tracks, and other structures' (Syl. Section 1) and that failure to exercise this care constituted negligence."

In the McMullen case the court cites the case of *Ches. & Ohio Ry.* v. *DeAtley*, 241 U. S. 310. To our way of thinking the DeAtley case is a much stronger case for the railroad company than either the McMullen case or the case here on review, but the Supreme Court of the United States found for the plaintiff, saying:

"'It is insisted that the true test is, not whether the employee did, in fact, know the speed of the train and appreciate the danger, but whether he ought to have known and comprehended;

whether, in effect, he ought to have anticipated and taken precautions to discover the danger. This is inconsistent with the rule repeatedly laid down and uniformly adhered to by this court. According to our decisions the settled rule is, not that it is the duty of an employee to exercise care to discover extraordinary dangers that may arise from the negligence of the employer or of those for whose conduct the employer is responsible, but that the employee may assume that the employer or his agents to have exercised proper care with respect to his safety until notified to the contrary, unless the want of care and the danger arising from it are so obvious that an ordinarily careful person, under the circumstances, would observe and appreciate them' (p. 315)."

The court also said:

"'Whether the risk was an extraordinary risk depended upon whether the speed of the train was greater than plaintiff reasonably might have anticipated; and this rested upon the same considerations that were determinative of the question of the engineer's negligence' (p. 317)."

The Kansas Supreme Court in the case of *Burks* v. *Santa Fe,* 83 Kan. 144, had before it for decision a case in which no one saw the actual accident. A freight conductor was killed by stepping between two cars. The facts in that case disclosed that the cars were equipped with coupling apparatus which was supposed to operate automatically. An eye witness thought Burks tried to raise the lever as the train approached the car, then stepped between the cars and was caught as they came together. Close to his feet were found, near the middle of the track, a lump of coal. It had the appearance of being scraped as though

someone had stepped upon it. It showed that a foot had slipped upon it and there was a mark near it showing that someone had slipped. Who slipped on the stone was not known or shown. The track at this place was not well kept and the evidence showed that from time to time lumps of coal of various sizes had been scattered along the track and then someone would come along and pick it up. The court said that the evidence that Burk was seen trying to raise the lever and then stepped between the rails, justified an inference that he went between the cars because the coupling device or lever had failed to work. On page 146 the court said:

> "Contributory negligence being an affirmative defense, the burden of proving which rests on the defendant, the court cannot treat it as conclusively established so long as the evidence is open to any other reasonable view. * * * The evidence bearing upon the cause of the accident was meager. Its substance has already been stated. The jury were justified in believing that Burks, who was said to have been an unusually careful and prudent man, would not have been caught and crushed between the cars except for the intervention of some unusual agency. The lump of coal lying near his feet, bearing the indications of having been stepped upon, together with the mark in the soil showing where a foot had slipped, gave room for a reasonable inference, in the absence of any more probable solution of the problem, that he had stumbled upon and fallen over it.
>
> "A more difficult question is whether the evidence warranted a finding that the company was negligent in respect to the condition of the track. There was nothing to show that this particular lump of coal had ever before been seen there. The testimony as to its weathered condition pos-

sibly authorized a deduction that it had been lying on the ground for some time. At all events there was an abundant showing that pieces of coal of similar size were habitually permitted to remain between the rails indefinitely, among grass and weeds that would necessarily hide them to some extent. The company must be deemed *to have had knowledge* of the continuous existence of the vegetation and the frequent presence of lumps of coal. *Whether the condition of the track showed a want of due care, and whether it occasioned the death of Burks, were questions for the consideration of the jury.* In the defendant's brief it is said:

> 'A little-used sidetrack at a small station presents a radically different situation from that of tracks in large railroad yards where many employees are constantly passing to and fro, and where, no doubt, there is at least a custom, if not a legal duty, to provide for inspection of the tracks.'

"What precautions are necessary, in order that it may be said that ordinary diligence has been shown in the inspection and care of the surface of a railroad track, doubtless depends to some extent upon the frequency of its use (*Williams* v. *The St. L. & S. F. Ry. Co.*, 119 Mo. 316, 322). *But just where the line should be drawn is a question of fact for the determination of the jury, rather than of law to be settled by the court*" (our italics).

So in the case at bar, we believe that both the court and the jury were justified in believing that Toops, who was shown to be a careful and prudent man, would not have been killed except for the intervention of some unusual agency, in this instance the defective condition of the track and the negligence of

the crew in kicking the cars down upon him without warning and without protecting the moving end thereof, as found by the jury. Their finding was amply sustained by the evidence.

The Kansas Supreme Court has not been unmindful that facts may be proved by circumstances, and that the fact that a given accident was unseen by anyone, does not preclude a recovery. We quote now from the case of *Foley* v. *Crawford*, 125 Kan. 252.

> (P. 259): "The defendant says: 'No allegation in his (the plaintiff's) petition was made as to what acts of negligence alleged were the proximate cause of death. . . . . And no proof was adduced that the acts of negligence alleged were the proximate cause of death.' The defendant filed a demurrer to the evidence of the plaintiff; that demurrer was overruled. The Amusement Syndicate Company argues that the evidence was insufficient to entitle the plaintiff to recover. Most of the facts surrounding the death of Joe Foley were conclusively established by the evidence. There was no dispute about them; but the evidence did not establish what caused him to fall or get out of the elevator and to the bottom of the elevator shaft. There was nothing to show that fact except the conclusively established facts. Those facts showed that he was instantly killed; that he was killed by being knocked out of, by jumping out of, or by falling out of the elevator to the bottom of the shaft. He could not have been knocked out, could not have jumped out or fallen out of the elevator if there had been a door to it, and the door had been closed. Probably the accident could not have occurred if there had been doors to the elevator shaft. The evidence tended to prove that the control of the elevator was not working properly. It was negligence for the defendant to operate the elevator without doors to the elevator

shaft, without a door on the elevator, or without proper control. The circumstances tended to prove that all of these three factors contributed to the death of Joe Foley. All three factors were alleged in the petition and were proved by the evidence. There was nothing to show contributory negligence on the part of Joe Foley. The evidence was sufficient to establish a case in favor of the plaintiff, and the demurrer thereto was properly overruled."

The question of whether or not circumstances in a case are sufficient upon which to base the findings of the jury was decided by the United States Circuit Court of Appeals in the case of *Cincinnati, N. O. & T. P. R. R. Co.* v. *Jones*, 113 C. C. A. 55, 192 Fed. Rep. 769, 47 L. R. A. (N. S.) 483. The facts are substantially as follows:

Jones brought the action to recover damages for the negligent killing of a man named Winters on the night of October 8, 1907. Winters was a brakeman and had been in the employ of the company for about 8 days. The company's track ran through several tunnels between Pine Knot, Kentucky, and Oakdale, Tennessee. Among them were tunnels No. 22, No. 23 and No. 24. The ceiling of tunnel No. 23 was low. Winters was last seen with his lantern on top of the train at a point several hundred feet back of the locomotive. It was proper for him to be on the train. Winters' body was found the next day about 200 feet from tunnel No. 24. There was a large gash over his right eye. Signs of blood were found on a piece of wood lying in the middle of tunnel No. 23, and also from the south end of the tunnel along the track to a point near the

mouth of tunnel No. 24. Tunnel No. 23 was 800 feet long. There was considerable testimony and conflicting testimony about the clearance in the tunnel. The railroad company filed a demurrer and moved for a directed verdict on the testimony, but it was refused and judgment rendered for the plaintiff. The only reason we are citing this case is to show the inferences in which the court indulged. Commencing on page 491, the opinion reads as follows:

> "The inquiry becomes pertinent, then, as to what part of the roof he in fact was occupying when he received the injury. Every part of a box car on which he could in our judgment have been, has been eliminated except the running board. He was not standing on the running board; this brings us to the point on which the decision must turn. Winters was not told or warned of the fact that any portion of the roof of any tunnel on the road, much less that any portion of the roof of tunnel No. 23, was lower than the roof was at the tunnel entrances; and yet, at the middle of tunnel No. 23 the portion of the roof over the track was 15 inches lower than it was at the north entrance. If Winters had been struck at the north entrance of the tunnel, it is hardly conceivable that the first appearance of bloodstains would have been found on the stick of wood near the middle of the tunnel, or that the continuous line of bloodstains found on the east side of the track would not have appeared before the south end of the tunnel was reached. The rational inference is that Winters' head struck the interior low portion of the tunnel roof. The first appearance of blood was discovered on the stick of wood found on the east side of the track at that place; and the fact that no sign of blood was found between that point and at the end of the tunnel reasonably tended to show that the blood found on the stick of wood came

from a spurt of blood caused by the stroke, and that the rest trickled over the roof and finally fell to the ground as the car passed out of the tunnel. Since we must assume for reasons before stated, that at the time he was struck he was not standing, the question whether he could have been struck while sitting becomes immaterial. The fact remains that he could, consistently with the warning he had received, have kept his body in some position (other than a sitting posture) similar to the one that he might well have taken when he safely passed into the tunnel, and still have been struck by the protruding portion of the tunnel roof. Testimony tending to show that other employees did not even sit in an upright position on the running board, when passing through this tunnel, cannot affect the right of recovery respecting one who does not appear to have had knowledge or means of knowing of the low portion of the roof in question. True, it is shown that Winters must have passed through this tunnel twice every twenty-four hours during his short service, and it is also to be inferred that he made trips over the road before he entered into defendant's employ; but it is not shown whether he passed through it in the daytime, or that the low projection was visible during the daylight. True, also, defendant maintains telltales at suitable distances from the tunnel entrances, but they served only as warning of approach to the tunnels; they were not calculated to give notice of any obstruction within the tunnel. Further, the car on which Winters was riding was not identified, and the fact appears that box cars vary in height. When these facts are considered, testimony showing distances between the running board and the low portion of the roof tend to confuse, rather than to show anything calculated to elucidate, the questions alike of defendant's negligence and Winters' assumption of risk or his contributory negligence. The proofs were fatally lacking respecting the car or the height of the car

on which Winters was riding. Hence, the question at last comes to this: Whether the defendant could maintain this tunnel roof with its central portion 15 inches lower than the roof is at the north entrance to the tunnel, and escape liability without showing that the person injured was either told of it, or was clearly chargeable with knowledge of it."

We believe that our theory of the Toops case and our explanation of the absence of blood on the front of the car that struck him, is true. The fact that a mashed wound of the kind suffered by Toops will not bleed instantly, and the fact that blood was positively found on every car except the front car, would not preclude the fact that his head was severed by the first car.

Other cases in point on the assumption of risk and on the negligence of defendants are:

Pennsylvania Ry. Co. v. *Goughnour,* 126 C. C. A. 39, 208 Fed. 961.

Hardwick v. *Wabash R. Co.,* 181 Mo. App. 156.

Southern Ry. Co. v. *Smith,* 123 C. C. A. 488, 205 Fed. 360.

McDonald v. *Ry. T. Co.,* 121 Minn. 273.

Bonbolis v. *Minneapolis & St. L. R. Co.,* 150 N. W. 385.

Thornton v. *Seaboard A. L. Ry. Co.,* 6 N. C. C. A. 85n, 93n, 82 S. E. 433.

Louisville & N. R. Co. v. *Johnson's Admx.,* 171 S. W. 487.

In *Pennsylvania Ry. Co.* v. *Goughnour,* above cited, Sections 1, 3 and 5 of the syllabus read:

"1. In an action for injuries to a freight conductor under the Federal Employers' Liability Act, plaintiff cannot be held to have assumed

the risk of the negligence of his flagman, his fellow servant, in failing to protect the rear of the train while standing on a main track.

"3. Where a freight conductor was caught and injured between his engine and the caboose by the engine being struck by a train approaching from the rear, due to flagman's failure to protect the rear end of the train, the flagman's negligence, under the Federal Employers' Liability Act, was the negligence of the railway company as a matter of law.

"5. Where a freight conductor was caught and injured between his engine and the caboose by the engine being struck by a following train, and the court properly submitted the question of the conductor's contributory negligence in failing to see that the flagman performed his duty to protect the rear end of the train to the jury, a charge that if, under the circumstances, the conductor's negligence contributed either in whole or in part to the injury, the jury, under the Federal Employers' Liability Act, should reduce plaintiff's recovery *pro tanto, the court did not err in affirming one of plaintiff's points that the conductor was entitled to assume, when he went between the engine and the caboose, that the flagman would obey the rules of the company and perform his duty to flag the following train*" (our italics).

And so in the instant case, Conductor Toops had a right to assume that his train crew would obey the rules of the company.

We call the court's special attention to the answer to question No. 10 set out in the record, page 76, for the reason that it is incomplete. The abstractor for the petitioner omitted a part of the answer. The complete answer appears in our counter abstract

on page 82 of the record. The part omitted from said answer reads as follows:

> "Third, poor condition of the track at derail switch."

In conclusion, we call the court's special attention also to the opinion of the Supreme Court of Kansas in the instant case (R. 91). This opinion was written by Mr. Justice Hopkins (who is now our new Federal Judge of Kansas), and it is a very able and analytical opinion and should be sustained and affirmed by this court.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

No. 303.—October Term, 1929.

The Atchison, Topeka and Santa Fe Railway Company, Petitioner, *vs.* Mabel G. Toops, Administratrix of the Estate of M. G. Toops, Deceased. } On Writ of Certiorari to the Supreme Court of the State of Kansas.

[April 14, 1930.]

Mr. Justice Stone delivered the opinion of the Court.

Respondent, plaintiff below, brought suit in the District Court of Reno County, Kansas, to recover under the Federal Employers' Liability Act for the death of her intestate. Judgment in her favor was affirmed by the Supreme Court of Kansas, 128 Kan. 189. This Court granted certiorari October 21, 1929, on a petition which urged as grounds for allowance of the writ that there was no evidence of negligence in the case or that any act of petitioner caused the death.

Decedent was a conductor in charge of petitioner's freight train, engaged in interstate commerce, while en route easterly from Elkhart to Dodge City, Kansas. He was killed near the station at Rolla, Kansas, at about one o'clock in the morning, in the course of a switching operation under his direction. At that point, north of the main line and connected with it by switches, is a "passing track" with an extension at its easterly end known as a "stock track". South of the station, which is south of the main line, is a switching track, referred to as an "elevator track", which forms a junction with the main line some three hundred feet or more east of the station platform.

On the night of the accident two switching operations were to be carried out by deceased at Rolla. The first, which was successfully completed, consisted of removing four loaded grain cars from the elevator track and coupling them, deceased assisting, to the train standing west of the station on the main line. The second involved the removal of fifteen empty grain cars, coupled to twelve

stock cars, from the passing and stock tracks to the main line and thence "kicking" the grain cars onto the elevator track, that is, the train of grain and stock cars was to be pushed by the engine westerly along the main line and the fifteen grain cars uncoupled from the westerly end of the stock cars while still in motion and before the stock cars had reached the switch to the elevator track, thus propelling the grain cars from the main line to the elevator track. The stock cars were then to be kicked back onto the passing track by a similar movement, after which the engine was to be coupled to the grain cars standing on the elevator track and they were to be spotted at desired locations on that track. Under the rules of petitioner, deceased was required to attend personally to these switching movements.

There were no eye witnesses to the accident. Deceased was last seen alive, standing, lantern and train book in hand, on the east end of the station platform. Plaintiff's own witnesses testified, without contradiction, that shortly before, one of the two brakemen of the train crew had read to the other and to deceased the switching list calling for the movement of the grain cars, and had then said that he would kick the cars onto the elevator track, to which deceased replied: "All right I will look out for them". After the grain cars had been kicked onto the elevator track and the stock cars onto the passing track, the engine was coupled to the grain cars and the spotting movement begun, when the body of the deceased was discovered. It was lying under the engine tender diagonally across the elevator track, with the shoulder against a "derail" about 180 feet west of the switch, connecting the elevator track with the main line, and about the same distance from the point on the platform where decedent had last been seen alive. His feet were toward the north, his head and arm had been severed from his body and lay just south of the track. His cap, lantern and lead pencil were lying near, together, south of the elevator track two or three feet from the south rail. His train book was found lying in the center of the track between the rails. The surface of the track between the rails showed that his body, after it had fallen to the ground, had been moved or dragged westward two or three feet until his shoulders were jammed against the derail. There were no marks of flesh or blood on any part of the first grain car, indicating that it had come into contact with the body of the deceased. There was

uncontradicted testimony that such marks of flesh and blood were found upon the south wheels of each of the succeeding fourteen grain cars and the engine tender.

It was controverted whether, within the meaning of printed rules of petitioner the place of the accident was at a "station" or in a "yard." The rules required that when cars were pushed by an engine "except when shifting or making up trains in yards", a flagman should be placed on the front of the leading car so as to signal the engineer in case of need, and that a white light must be placed on the leading car at night. No flagman or brakeman, and no light was placed on the leading grain car. Owing to the location of a curve and cut through which the grain cars passed in order to reach the elevator track, it was impossible for the engineer or the two brakemen to see deceased or his lantern at the point where his body was found. There was evidence that no warning signal by bell or whistle was given in the course of the kicking movement.

It is the theory of the respondent, conforming to the findings of the jury in its special verdict, that deceased, while crossing the track near the derail, where, according to some of the testimony the roadbed was overgrown with weeds and so thinly ballasted that the track had become "skeletonized," was knocked down by the leading grain car and killed by that and the succeeding cars passing over him, and that his death was attributable to negligence in carrying out the kicking movement of the grain cars without signal and without placing a flagman or a light on them.

But proof of negligence alone does not entitle the plaintiff to recover under the Federal Employers' Liability Act. The negligence complained of must be the cause of the injury. The jury may not be permitted to speculate as to its cause and the case must be withdrawn from its consideration unless there is evidence from which the inference may reasonably be drawn that the injury suffered was caused by the negligent act of the employer. *Patton* v. *Texas & Pac. Ry. Co.*, 179 U. S. 658; *New Orleans & N. E. R. R. Co.* v. *Harris*, 247 U. S. 367, 371; *St. Louis & San Francisco Ry. Co.* v. *Miller*, 271 U. S. 344, 347; *C. M. & St. P. Ry.* v. *Coogan*, 271 U. S. 472; *New York Central Railroad Co.* v. *Ambrose*, decided February 24, 1930.

Even though we assume that in all the respects alleged the petitioner was negligent, the record does not disclose any facts tending to show that the negligence was the cause of the injury and death.

The only evidence relied upon by respondent to account for the deceased's presence at the point of the accident was that already stated, which indicated that he had proceeded to the elevator track in order, as he had said, to "look out" for the kicked cars, whether by climbing onto them and controlling their movement on the elevator track, as is usual in such movements, or by assisting in the spotting movement to be later carried out, can only be inferred. It is the theory of respondent that he attempted to cross the track so as to be in a position to signal the engineer who was on that side of the train. But as the grain cars already were, or about to be, uncoupled from the train, there was evidently no immediate purpose in his being so located. What actually took place can only be surmised. Whether he was run down on the track by the first car or he attempted unsuccessfully to board the train on one side or the other or succeeded and in either case finally came to his death by falling under or between the moving cars is a matter of guesswork.

Even though we make the doubtful assumption that the train was not within a "yard" and so was required to signal its movements, it is plain that deceased and his train crew treated the place as a yard where warning of switching movements was not required. On respondent's own theory deceased was fully cognizant of the contemplated movement. He knew that the grain cars were to be kicked onto the elevator track where he went to meet them, and knew that his train crew, consisting of only two brakemen, and the lanterns which they carried, would be needed in attending to the switching, signalling and uncoupling of cars in order to kick the train of stock cars onto the passing track and that the grain cars for which he was to "look out" would be without brakeman or warning light. It is presumed that deceased proceeded with diligence and due care. *Looney* v. *Metropolitan R. R. Co.*, 200 U. S. 480, 488. The movement of the fifteen cars to and across the switch and onto the elevator track in a quiet neighborhood on a still night cannot be assumed to have given no warning sounds of their approach.

All these factors taken together render highly improbable the theory of respondent that deceased was run down by the grain cars while he was crossing or standing upon the track, and they give sharp emphasis to the absence of any proof of the fact, indispensable to respondent's case, that deceased, while standing on or attempting to cross the track, was struck by the leading car. There

is no evidence to suggest that the body, after falling to the ground, was moved or dragged more than two or three feet. There were no marks of blood or flesh of the decedent upon any part of the leading car, although such marks were found on most if not all of the cars following. The kicked grain cars were moving slowly when they passed the switch to the elevator track as they came to a stop two or three car lengths west of the derail. It is true that there was medical testimony that in the case of crushing injuries bleeding might not immediately ensue, but the length of this period of delay was not mentioned and the testimony given was not stated by any witness to be applicable to injuries of the extent and character suffered by the deceased. It does not account for the absence from the leading car of the other evidences of the injury found on the other cars. As evidence to support the special finding of the jury that the deceased was struck by the first car, this testimony is without substance. See *Gulf, Mobile & Northern R. R.* v. *Wells*, 275 U. S. 455. If allowed to sustain the verdict it would remove trial by jury from the realm of probability, based on evidence, to that of surmise, and conjecture.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.